(29,669)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 359.

IN THE MATTER OF PETITION OF EAST RIVER TOWING CO., INC., FOR LIMITATION OF LIABILITY OF THE STEAMTUG EDWARD, HER ENGINES, ETC.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Page.
Certificate from United States circuit court of appeals for the second circuit	1
Statement of facts	1
Questions certified	3
Judges' signatures	4
Clerk's certificate	5

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1923.

[fol. 1] **UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

In the Matter of the Petition of the East River Towing Company, Inc., for limitation of Its Liability as Owner of the Steamtug Edward, Her Engines, etc.

Before Rogers, Hough, and Mayer, Circuit Judges

STATEMENT OF FACTS

This cause came here by appeal from a final order in Admiralty entered in the District Court for the Eastern District of New York.

The following facts appear from the *apostles*: East River Towing Company, Inc., is a corporation of the State of New York and owner of steamtug Edward. On August 2, 1922, the Edward sank in navigable waters of the United States, viz: New York harbor. The cause of her sinking was an explosion of the tug's boiler. Said sinking and/or explosion caused loss of life and injury to property and persons. Especially did it cause the death of one Thomas McCaffrey, a master mariner, and at the time of said sinking employed as captain of said tug Edward.

Said explosion and sinking occurred within the territorial limits of the State of New York; and one Elizabeth McCaffrey as administratrix, etc. of said Thomas McCaffrey, deceased, instituted an action at law in the Supreme Court of said State against said East River [fol. 2] Towing Company, Inc., seeking to recover (pursuant to the statutes of said State) damages for the death of said decedent; alleging the same to have been caused by the negligence of said defendant.

Thereupon the East River Towing Company, Inc., as owner of said Edward, filed its petition in the District Court of the United States for the Eastern District of New York, pursuant to U. S. Rev. Stat., Secs. 4283 et seq. and the rules in Admiralty prescribed by the Supreme Court of the United States in respect of proceedings for limitation of ship owner's liability.

Said petition alleges that the claims (including McCaffrey's) already made against it in respect of said sinking and/or explosion, exceed the value of its interest in said steamtug and her freight pending; it avers petitioner's desire to contest and deny its liability and that of said steamtug for any and all loss, destruction or injury caused by said explosion and/or sinking; and it prays the Court (inter alia) to issue its monition requiring all persons claiming as aforesaid to appear and make their several claims before a Commissioner to be named by the Court, and also to issue its injunction (pursuant to Admiralty Rule 51) restraining the prosecution of said action of said Elizabeth McCaffrey, administratrix, or of the claims set forth therein except in the limitation proceeding begun by said petition. After proceedings regular under the statutes and rules above referred to the District Court did issue injunction restraining

[fol. 3] the further prosecution of the said action of said Elizabeth McCaffrey, administratrix, etc.

Thereupon said Elizabeth McCaffrey, administratrix, appeared specially in the limitation proceeding aforesaid and moved to "vacate, set aside and declare null and void" the aforesaid injunction.

After hearing, said District Court ordered as follows:

"It appearing that Congress, by the enactment of the Act of June 5th, 1922, commonly known as the Jones Act, intended to change the law with respect to limitation of liability to the extent of allowing a trial by a jury to said plaintiff by making the provisions regulating such limitation inapplicable to a case falling within the provisions of said Act of June 5th, 1922, that the said motion be and hereby is in all things granted, and that the said order entered herein on December 5th 1,922, restraining the further prosecution of the action, pending in the Supreme Court of New York, County of Kings, where Elizabeth McCaffrey as administratrix of the goods, chattels and credits of Thomas McCaffrey deceased is plaintiff and the East River Towing Co., Inc., is defendant, be and the same hereby is vacated and set aside."

From this order petitioner took the present appeal.

QUESTIONS CERTIFIED

(1) If an action at law be brought such as is described in Merchant Marine Act 1920 Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?

(2) Has the Merchant Marine Act 1920, Sec. 33, impliedly repealed the statute regarding limitation of liability of ship owners [fol. 4] so far as claims or suits based on personal injuries to or death of seamen are concerned?

Dated May 28, 1923.

Henry Wade Rogers, Charles M. Hough, Julius M. Mayer, Judges of the United States Circuit Court of Appeals for the Second Circuit.

[fol. 5] UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Petition of East River Towing Company, Inc., for limitation of liability, was duly filed

and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at the City of New York on the 29th day of June, 1923.

Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit. [Seal of United States Circuit Court of Appeals for the Second Circuit.]

[fol. 6] [File endorsement omitted.]

Endorsed on cover: File No. 29,669. U. S. Circuit Court Appeals, 2d Circuit. Term No. 359. In the matter of petition of East River Towing Co., Inc., for limitation of the liability of the Steamtug Edward, her engines, &c. (Certificate.) Filed June 7th, 1923. File No. 29,669.

(29,669)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 81

IN THE MATTER OF PETITION OF EAST RIVER TOWING CO., INC., FOR LIMITATION OF LIABILITY OF STEAM-TUG "EDWARD," HER ENGINES, ETC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Amended certificate from the United States circuit court of appeals, second circuit	1	1
Order amending certificate	1	1
Judges' signatures	3	2
Clerk's certificate	3	3

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1924

[fol. 1] AT A STATED TERM OF THE

CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Held at the Federal Building, in the City of New York, on the 7th Day of Oct., 1924

Present:

Honorable Henry Wade Rogers,
" Charles M. Hough,
" Martin T. Manton,
Circuit Judges.

In the Matter of the Petition of the EAST RIVER TOWING CO., INC., for Limitation of Its Liability as Owner of the Steamship Edward, Her Engines, etc.

ORDER AMENDING CERTIFICATE

Upon the annexed stipulation and upon motion of William S. Butler, attorney for Elizabeth McCaffrey as administratrix of the goods, chattels and credits of Thomas McCaffrey, deceased, it is

Ordered that the certificate of the Circuit Court of Appeals, 2nd Circuit to the Supreme Court of the United States herein bearing date May 28, 1923, be and the same hereby is amended by striking from said certificate in the third paragraph thereof the words and brackets (pursuant to the statutes of said State), and inserting in lieu thereof the words and brackets (pursuant, so plaintiff claims, to Section 33 of the Merchant Marine Act June 5, 1920, the following being a copy of the complaint in said action;

"SUPREME COURT, KINGS COUNTY

ELIZABETH MCCAFFREY, as Admx. of the Goods, Chattels, and Credits of Thomas McCaffrey, Deceased, Plaintiff,

against

EAST RIVER TOWING COMPANY, Defendant

[fol. 2] Plaintiff alleges:

1. Plaintiff alleges that at all the times hereinafter mentioned the defendant was and now is a domestic corporation.

2. That at all the times hereinafter mentioned the defendant was and now is in the towing business in the City of New York and elsewhere.

3. That at all the times hereinafter mentioned the defendant was the owner of the tub boat 'Edwards.'

4. That at all the times hereinafter mentioned the defendant maintained, operated and controlled the tug boat 'Edwards.'

5. That at all the times hereinafter mentioned the said tug boat 'Edwards' was in the possession and custody of the defendant.

6. That at all the times hereinafter mentioned the said tug boat 'Edwards' was engaged for and on behalf of the defendant in plying the navigable waters of the East River, New York Bay, New York.

7. That at all the times hereinafter mentioned the said tug boat 'Edwards' was flying the American flag and was registered at the port of New York by the defendant.

8. That on the 2nd day of August, 1922 the plaintiff's intestate was in the employ of the defendant.

9. That pursuant to his said employment by the defendant, plaintiff's intestate was engaged as master of the said tug boat 'Edwards' on the 2nd day of August, 1920.

10. That on the said 2nd day of August, 1920, plaintiff's intestate was pursuant to his employment for and on behalf of the defendant engaged as master of the said tug boat 'Edwards' at the place aforesaid.

11. That on the 2nd day of August, 1922 while the plaintiff's intestate was pursuant to his said employment engaged in the work aforesaid, for and on behalf of the defendant, the boilers and engines upon the said tug boat 'Edwards' were by reason of the negligence and carelessness of the defendant, in failing to provide the plaintiff with competent fellow workmen; a proper and safe place to work, and proper and safe ways, works, machinery and appliances, for the performance of the work in hand, and in failing to safeguard, inspect and keep safe the place, appliance and apparatus used in said work, and in failing to warn, guard and protect the plaintiff's intestate against the danger thereof; caused and permitted to explode, whereby the plaintiff's intestate was fatally injured.

[fol. 3] 12. That the injuries sustained by the plaintiff's intestate at the time and place aforesaid caused his death on the said 2nd day of August, 1920.

13. Plaintiff's intestate left him surviving his wife, Elizabeth McCaffrey, and seven children, to wit: Catherine Walsh, Joseph McCaffrey, Mary McCaffrey Brogan, Thomas McCaffrey, James McCaffrey, Francis McCaffrey and Alice McCaffrey, who have been damaged by his death in the sum of One hundred thousand ($100,000) dollars.

14. That pursuant to an order of the Surrogate's Court, bearing date September 1st, 1922, the plaintiff was duly appointed administratrix of the goods, chattels and credits of said Thomas McCaffrey deceased, and that the plaintiff duly qualified as such administratrix on said date; and letters of administration were thereupon duly

issued to the plaintiff, and she was authorized and empowered to prosecute this action as such administratrix.

Wherefore plaintiff demands judgment against the defendant for the said sum of One hundred thousand ($100,000) dollars' damages, together with the costs of this action.

William S. Butler, Attorney for Plaintiff, Office & P. O. Address 190 Montague St., Brooklyn, N. Y."

Enter.

HENRY WADE ROGERS.
C. M. HOUGH.
MARTIN T. MANTON.

A true copy. Wm. Parkin, clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 4] [File endorsement omitted.]

[fol. 5] [File endorsement omitted.]

CONTENTS.

	PAGE
BRIEF	1-56
STATEMENT	1
1—*The Facts*	2
2—*The Questions Certified*	4

FIRST POINT.

THE ACTS OF MARCH 3, 1851, OF JUNE 26, 1884, AND OF JUNE 19, 1886 (REVISED STATUTES, SECTIONS 4282-4289), CONSTITUTED A STATUTORY ADOPTION INTO OUR LAW OF A REMEDY BY WHICH SHIPOWNERS COULD INVOKE THE ANCIENT AND ALMOST UNIVERSAL MARITIME DOCTRINE OF LIMITATION OF LIABILITY.

THE PURPOSE OF THE LAW WAS TO ENCOURAGE THE BUILDING OF AND INVESTMENT IN SHIPS, AND AS A CONSEQUENCE IT IS TO BE LIBERALLY CONSTRUED AND FULLY ENFORCED 6

1. *The Limited Liability Law and its Historical Background* 6

2. *The Purposes of the Doctrine of Limited Liability of Shipowners and the Reason behind it* 11

SECOND POINT.

PAGE

THE PROPER PROCEDURE FOR OBTAINING THE BENEFIT OF THE LIMITED LIABILITY LAW IS FULLY OUTLINED IN THE DECISIONS AND RULES OF THIS COURT. A LIMITATION OF LIABILITY PROCEEDING MUST NECESSARILY BE EXCLUSIVE IN ORDER TO GIVE THE SHIPOWNER THE REMEDY AND RELIEF INTENDED BY CONGRESS 17

THIRD POINT.

THE MERCHANT MARINE ACT OF 1920, COMMONLY KNOWN AS THE JONES ACT, DID NOT CHANGE THE LAW PERMITTING SHIPOWNERS TO LIMIT THEIR LIABILITY 25

1. *The Purpose of the Merchant Marine Act of 1920* 25

2. *Section 33 of the Merchant Marine Act and its Effect on Seamen's Rights* 27

3. *The Status of §33 in our Maritime Jurisprudence has been settled by this Court* 34

4. *There was not any Repeal of the Limitation Act by Implication* 38

CONCLUSION.

PAGE

THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE AND THE SECOND IN THE NEGATIVE 56

APPENDICES 57-146

APPENDIX NO. I.

THE HISTORICAL DEVELOPMENT OF THE DOCTRINE OF LIMITATION OF LIABILITY OF SHIPOWNERS..... 57

APPENDIX NO. II.

TEXT OF STATUTES RELATING TO LIMITATION OF LIABILITY OF SHIPOWNERS, BEING THE ACT OF MARCH 3, 1851, AS AMENDED AND SUPPLEMENTED BY THE ACTS OF JUNE 26, 1884, AND OF JUNE 19, 1886 93

APPENDIX NO. III.

RULES OF THE UNITED STATES SUPREME COURT RELATING TO THE LIMITATION OF LIABILITY OF SHIPOWNERS PROMULGATED DEC. 6, 1920. EFFECTIVE MARCH 7, 1921..... 99

APPENDIX NO. IV.

PAGE

CHRONOLOGICAL LIST OF CASES IN THE UNITED STATES SUPREME COURT DEALING WITH THE LIMITATION OF LIABILITY OF SHIPOWNERS 109

APPENDIX NO. V.

OUTLINE OF STEPS IN A LIMITATION OF LIABILITY CASE 111

APPENDIX NO. VI.

SECTION 33 OF THE MERCHANT MARINE ACT, 1920, IN THE CONGRESSIONAL RECORD 117

APPENDIX NO. VII.

RECENT UNREPORTED OPINION BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DEALING WITH THE QUESTIONS CERTIFIED IN THE INSTANT CASE 125

INDEX OF CASES.

PAGE

Alaska Steamship Co. *vs.* United States, 259 Fed. 713; reversed on another ground 253 U. S. 113.... 45
Arthur *vs.* Homer, 96 U. S. 137..... 37

The Betsey and Charlotte, 4 Cranch 443..... 37
Butler *vs.* Boston Steamship Co., 130 U. S. 527, 10, 11, 14, 45, 48, 53

Capitol Transportation Company *vs.* Cambria Steel Company, 249 U. S. 334..... 16
Carlisle Packing Co. *vs.* Sandanger, 259 U. S. 255 29
In re Charles Nelson Co., 294 Fed. 926..... 23
Chappell *vs.* Bradshaw, 35 Fed. 923..... 41
Chelentis *vs.* Luckenbach S. S. Co., 247 U. S. 372 ..... 29, 32
Craig *vs.* Continental Ins. Co., 141 U. S. 638..... 10, 48

The Davenport (Supreme Court of California) 1924 American Maritime Cases 758..... 4

The Edward, 291 Fed. 1017; 294 Fed. 686..... 1, 3
The El Mundo, 294 Fed. 577..... 23

Flynn *vs.* Christenson, 273 Fed. 385..... 48
The F. H. Marvin, 1924 American Maritime Cases 53 22
Franke *vs.* Murray, 248 Fed. 865..... 39
The Frederick Luckenbach, 294 Fed. 577..... 23
Frost *vs.* Wenie, 157 U. S. 46..... 39, 40

PAGE

Grahl *vs.* United States, 261 Fed. 487 39

The Harry Hudson Smith, 142 Fed. 724 48

The Hewitt, 294 Fed. 577 23

The Hoffmans, 171 Fed. 455 41

The Iroquois, 194 U. S. 240 29

Kemp Lumber Co. *vs.* Howard, 237 Fed. 574 39

La Bourgogne, 210 U. S. 95 ..... 15, 21, 25

Lorang *vs.* Alaska S. S. Co., 298 Fed. 547 4

The Lusitania, 251 Fed. 715 21

The Main vs. Williams, 152 U. S. 122 ..... 7, 9

Moore *vs.* American Transportation Company, 24 How. 1 15

Nichols & Cox Lumber Co. *vs.* United States, 212 Fed 588 39

Norwich Company *vs.* Wright, 13 Wall. 104 ..... 7, 11, 19, 48

The Osceola, 189 U. S. 158 29

Patrone *vs.* Howlett, 237 N. Y. 394 5

The Passaic, 204 Fed. 266 ..... 32, 43

Panama Railroad Company *vs.* Johnson, 264 U. S. 375 ..... 30, 34, 36

Providence & N. Y. S. S. Co. *vs.* Hill Manufacturing Co., 109 U. S. 578 ..... 11, 13, 15, 19, 20, 48, 52

Reo Atlanta Co. *vs.* Stern, 279 Fed. 422 40

Richardson *vs.* Harmon, 222 U. S. 96 ..... 10, 11, 15, 48

PAGE

The San Pedro, 223 U. S. 365 ..... 2, 18, 48
The Scotland, 105 U. S. 24 ..... 11, 12, 48
Scarff *vs.* Metcalf, 107 N. Y. 211 29
The Sally, 2 Cranch 406 27
The Sarah, 8 Wheat. 391 27
Soliss *vs.* General Electric Co., 213 Fed. 204 ..... 38, 40
Southern Pacific Co. *vs.* Jensen, 244 U. S. 205 ..... 11, 16

The Titanic, 233 U. S. 718 ..... 21, 48, 54

United States *vs.* Greathouse, 166 U. S. 601 ..... 39, 40
United States *vs.* Healey, 160 U. S. 136 40
United States *vs.* Lee Yen Tai, 185 U. S. 213 40
United States *vs.* Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, 212 Fed. 40 48

The Vengeance, 3 Dallas, 297 37

Washington *vs.* Miller, 225 U. S. 422 39
Wenzler *vs.* Robin Line S. S. Co., 277 Fed. 812 ..... 4, 52
Whelan *vs.* United States, 7 Cranch 112 37
White *vs.* Island Transportation Co., 233 U. S. 346 10
Wilmot *vs.* Mudge, 103 U. S. 217 40
Witte *vs.* Shelton, 240 Fed. 265 40

STATUTES.

PAGE

Act of Congress of August 23, 1842, c. 188, sec. 6; 5 Stat. 518; Rev. Stat. secs. 862, 917, 918 20

Act of Congress of December 21, 1898, c. 28, sec. 23; Comp. Stat. sec. 8392 4

Act of Congress of June 29, 1906, c. 3591, sec. 7; 34 Stat. 595 41

Federal Employers' Liability Act, 35 Stat. 65, 66; Comp. St. 8657, 8659, 8660 ..... 30, 32, 43, 51

Limited Liability Law, Acts of March 3, 1851, of June 26, 1884, and of June 19, 1886; Rev. St., secs. 4282-4289; Comp. Stat. 8020-8028 ..... 6, 8, 10, 17, 39, 41, 51

Merchant Marine Act of 1920, preamble and sections 2 and 33 ..... 5, 20, 23, 25, 27, 51

Revised Statute 648 37

Safety Appliance Acts, Comp. St. 8605-8650; 27 Stat. 531, 35 Stat. 476, 36 Stat. 298 33

Steamboat Inspection Act of February 28, 1871; 16 Stat. 440; Comp. St. 8269 45–47

Transportation Act of February 28, 1920 45

MISCELLANEOUS.

PAGE

Act of Parliament, 7 Geo. II. Ch., 15 8

Congressional Globe, 1850, 1851, pp. 317, 331, 479, 713-738, 776, 779, 816 9

Consolato del Mare 7

Codes of Argentina, Belgium, Brazil, Chile, France, Germany, Italy, The Netherlands, Portugal, Russia and Spain 8

Hargrave's Law Tracts, 253, 254 51

Hanseatic Ordinance of 1644 7

Judicial Code, section 239 1

Ordinance of Rotterdam, 1721 8

Ordonnance de la Marine of 1681 8

Rules of the United States Supreme Court dealing with Limitation of Liability of Shipowners. May 6, 1872, 13 Wall. XII; March 7, 1921, 254 U. S. 703 ..... 17, 20, 23

SUPREME COURT OF THE UNITED STATES.

In the Matter

of

The Petition of the East River Towing Co., Inc., for Limitation of its Liability as Owner of the Steamtug *Edward*, her engines, etc.

BRIEF FOR PETITIONER-APPELLANT.

Statement.

This matter, which involves a petition for limitation of liability by a tug owner, comes before the court on a certificate sent under and in pursuance of Section 239 of the judicial code to this court by the United States Circuit Court of Appeals for the Second Circuit.

The certificate is reported below as *The Edward*, 291 Fed. 1017.

This certificate was sent up after argument had been heard of the appeal by the petitioner, East River Towing Company, Inc., to the said Circuit Court of Appeals.

The appeal was from a decree, as resettled, of the United States District Court for the Eastern District of New York, by which the District Court, sitting in

admiralty, had vacated, in respect of the state court action hereinafter mentioned, the usual stay of outside proceedings which this court has held, in *The San Pedro,* 223 U. S. 365 (1912), to be an inherent and necessary part of all petitions for limitation of liability.

The decision is reported below as *The Edward,* 294 Fed. 686.

1. *The Facts.*

The controversy out of which the limitation proceeding arose had its origin in the sinking of the steamtug *Edward,* with the loss of several lives, in New York harbor on August 2nd, 1922.

Among those killed was the master of the tug, one Thomas McCaffrey, whose administratrix, on or about October 2nd, 1922, brought an action against this petitioner in the Supreme Court of the State of New York, County of Kings, to recover damages resulting from his death.

On or about December 5th, 1922, this petitioner instituted proceedings in the United States District Court, Eastern District of New York, for limitation of its liability as owner of the said tug, pursuant to the provisions of the limited liability acts and the rules in admiralty prescribed by this court in respect of such proceedings.

On the same day, after proceedings regular under the statutes and rules above referred to, an order issued out of said court restraining all further prosecution of the said state court action.

On January 27th, 1923, application having been made by the plaintiff in the said state court action, a decree issued out of said District Court vacating the said restraining order of December 5th, 1922. *The Edward*, 294 Fed. 686.

On February 9th, 1923, application having been made by the petitioner herein, the said decree of January 27th, 1923, was resettled.

The decree, as resettled, provided:

> "ORDERED, it appearing that Congress, by the enactment of the Act of June 5th, 1920, commonly known as the Jones Act, intended to change the law with respect to limitation of liability to the extent of allowing a trial by a jury to said plaintiff by making the provisions regulating such limitation inapplicable to a case falling within the provisions of said Act of June 5th, 1920, that the said motion be and hereby is in all things granted, and that the said order entered herein on December 5th, 1922, restraining the further prosecution of the action, pending in the Supreme Court of New York, County of Kings, wherein Elizabeth McCaffrey as administratrix of the goods, chattels and credits of Thomas McCaffrey deceased is plaintiff and the East River Towing Co., Inc., is defendant, be and the same hereby is vacated and set aside."

From the decree as thus resettled the petitioner took its appeal, out of which grew the Certificate now under argument in this court.

2. *The Questions Certified.*

The questions certified to this court by the Circuit Court of Appeals are as follows:

> "(1) If an action at law be brought such as is described in Merchant Marine Act 1920 Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?
>
> "(2) Has the Merchant Marine Act 1920, Sec. 33, impliedly repealed the statute regarding limitation of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned?" *Record*, page 2.

It may be observed parenthetically that, as applied to the particular case now before this court, these questions as framed by the Circuit Court of Appeals do not deal with three further questions which naturally will present themselves in such a litigation and which appellant believes have not been passed upon by this court:

> (1) Whether a plaintiff seeking to sue under the act in question must signify his election by appropriate wording in the complaint.
>
> (2) Whether the master of a vessel is a seaman within the meaning of the said act (See U. S. Comp. St., 1918, Section 8392).
>
> (3) Whether an action brought under the said act may properly be instituted in some forum other than a federal court (See *Wenzler* v. *Robin Line S. S. Co.*, 277 Fed. 812; *Lorang* v. *Alaska S. S. Co.*, 298 Fed. 547; *The Davenport*, 1924 American Maritime Cases, 758, decided by the Supreme Court of

California, March 25, 1924; *Patrone* v. *Howlett*, 237 N. Y. 394; all of which, except the New York case, hold that suit may properly be instituted only in a federal court).

These questions were not presented to the Circuit Court of Appeals on the argument of the appeal taken to that court in this proceeding, and appellant does not seek to present them here, as they do not seem to be embraced within the certified questions. They are called to the attention of this court merely for the reason that they are questions sure to arise under Section 33 of the Merchant Marine Act, and, therefore, perhaps appropriate to have in mind whilst considering the certified questions.

Appellant contends:

1. That the first certified question should be answered in the affirmative;

2. That the second certified question should be answered in the negative;

3. That the Merchant Marine Act of 1920, known as the Jones Act, did not change the law with respect to limitation of liability to any extent whatsoever; and

4. That the said District Court erred in vacating the order restraining prosecution of the said state court action.

FIRST POINT.

THE ACTS OF MARCH 3, 1851, OF JUNE 26, 1884, AND OF JUNE 19, 1886 (REVISED STATUTES, SECTIONS 4282-4289), CONSTITUTED A STATUTORY ADOPTION INTO OUR LAW OF A REMEDY BY WHICH SHIPOWNERS COULD INVOKE THE ANCIENT AND ALMOST UNIVERSAL MARITIME DOCTRINE OF LIMITATION OF LIABILITY.

THE PURPOSE OF THE LAW WAS TO ENCOURAGE THE BUILDING OF AND INVESTMENT IN SHIPS, AND AS A CONSEQUENCE IT IS TO BE LIBERALLY CONSTRUED AND FULLY ENFORCED.

1. *The Limited Liability Law and its Historical Background.*

The Act of March 3, 1851, commonly known as the Limited Liability Law, contains the following provision (R. S., Section 4283; U. S. Comp. St., 1918, Section 8021):

> "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

The historical development of the principle of limitation of a shipowner's liability is treated at some length in the opinions of this court in:

Norwich Company v. *Wright*, 13 Wall. 104;
The Main v. *Williams*, 152 U. S. 122.

The civil law and the common law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew.

It is difficult to say with accuracy when and where the limitations of liability universal in modern maritime law originated. But however they did originate, they had become firmly established among the leading maritime nations of Europe, possibly in the Fourteenth and certainly by the Seventeenth Century. Limitations of liabilities substantially similar to those found in the modern laws are found in the *Consolato del Mare*, the writings of *Vinnius* and the Hanseatic Ordinance of 1644.

Annexed hereto as *Appendix I* hereof is a memorandum on the "*Historical Development of the Doctrine of Limitation of Liability of Shipowners.*"

This memorandum is appended, in case the court should be interested in observing from it that the shipowner's limitation of liability has had almost universal application for many centuries past, and is the law among the maritime nations of the world at the present time.

Indeed, the doctrine seems to have been almost universal since commerce became general in early mediaeval times.

It is an interesting reflection that maritime law seems to have been uniform among the maritime nations in the early times, and that, although this uniformity was temporarily interfered with by the growth of the principle of nationality, there seems now to be a strong trend back again to the ancient uniformity.

The French *Ordonnance de la Marine* of 1681 declares that the owners of the ship shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing the ship and freight. A similar provision appears in the Ordinance of Rotterdam of 1721.

The provisions of the French *Ordonnance* of 1681 were carried into the modern *Code de Commerce,* the German Marine Code, the Code of the Netherlands, the Belgian Code, the Italian Code, the Imperial Russian Code, the Spanish Code, the Portuguese Code, the Brazilian Code, the Argentine Code and the Chilean Code.

The earliest legislation in England upon the subject is found in the act of 7 George II, passed in 1734.

The earliest American legislation upon this subject is found in a statute of Massachusetts passed in 1818, based substantially upon the statute of George II. It was followed by an act of the legislature of Maine in 1821, copied from the statute of Massachusetts.

The first act of Congress adopting this universal doctrine of limitation of liability of shipowners was passed by Congress on March 3, 1851.

The reason for the passage of the Act, as shown by

the debates on it in Congress, was that at that time the United States was the largest ship-owning nation and desired to have laws as favorable to shipowners as those of England, France and the other European nations.*

In the language of this court in *The Main* v. *Williams*, 152 U. S. 122, 128:

> "The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of *The Lexington*, reported under the name of the *New Jersey Steam Nav. Co.* v. *Merchants Bank*, 6 How. 344, was decided by this court. In this case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among shipowners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act. * * *"

The text of the Act of March 3, 1851, and of the Acts of June 26, 1884 and of June 19, 1886, amendatory thereof and supplementary thereto are given as *Appendix II* hereof.

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* The debates precedent to the passage of the Act of Mar. 3, 1851, are to be found in the *Congressional Globe* which covers the 2nd session of the 31st Congress, 1850, 1851.

The debates in the Senate are to be found at the following pages of the *Congressional Globe*, 1850, 1851: 317, 331, 479, 713-738, on which page the record of the passage of the Act by the Senate occurs.

In the House of Representatives the law was discussed, *Congressional Globe*, 1850, 1851, at 776, passed at 779.

A concurrent report was adopted by the Senate and the House on March 3, 1851. *Congressional Globe*, page 816.

The benefit of the Limited Liability Law, which always had covered seagoing vessels, was, by amendment of June 19, 1886 (24 Stat. 80; U. S. Comp. St., 1918, Section 8027), extended to

> "• • • all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters."

Under the act of June 26, 1884 (C. 121, Section 18; 23 Stat. 57; U. S. Comp. St. 1918, Section 8028), held to be *in pari materia* with the act of 1851, the limitation of a shipowner's liability was extended to include liabilities arising *ex contractu* or from nonmaritime torts.

Richardson v. *Harmon*, 222 U. S. 96.

That the Limited Liability Law is applicable to cases of personal injury and death, as well as to cases of loss of or injury to property, is well established.

Butler v. *Boston Steamship Co.*, 130 U. S. 527;
Craig v. *Continental Ins. Co.*, 141 U. S. 638.

> "• • • due regard for the broad terms and dominant force of Section 4283 requires that Sections 4284 and 4285 be construed as authorizing a proceeding for limitation of liability whether there be a plurality of claims or only one • • •." 233 U. S., 351.

White v. *Island Transportation Co.*, 233 U. S. 346, 351;
Richardson v. *Harmon*, 222 U. S. 96.

2. *The Purposes of the Doctrine of Limited Liability of Shipowners and the Reason behind it.*

The Limited Liability Law evidences the manifest policy of Congress to encourage investment in ships. This policy has been recognized both in the older and in the recent decisions of this and other federal courts.

Norwich Company v. *Wright*, 13 Wall. 104;
The Scotland, 105 U. S. 24;
Providence & N. Y. S. S. Co. v. *Hill Manufacturing Co.*, 109 U. S. 578;
Butler v. *Boston Steamship Co.*, 130 U. S. 527;
Richardson v. *Harmon*, 222 U. S. 96, 104;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 218.

In *Norwich Company* v. *Wright*, 13 Wall. 104, is outlined the history of limitation of liability of shipowners, and the reasons underlying the doctrine.

Mr. Justice Bradley, speaking for this court, after referring to the history of the doctrine in other nations and the acts passed by them to support it, said at page 119:

> "In the light of all this previous legislation, the Act of Congress was passed in 1851. * * * * * * * * * * * *
>
> The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are gen-

erally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. * * * The public interests require the investment of capital in shipbuilding, * * *" *Page* 121.

In *The Scotland*, 105 U. S. 24, this court again speaking through Mr. Justice Bradley said, at page 31:

"* * * Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As *Grotius* says, in reference to this very matter of shipowners, 'Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master.' Jure B. & P., lib. 2, c. 11, s. 13."

This court there further stated at pages 30-31:

"* * * This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. * * *

"But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the Act of Congress, we have announced that we propose to administer justice in maritime cases * * *"

And as Mr. Justice Bradley states later in the leading case of *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578 at page 588 (italics ours):

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; *but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.*"

In *The City of Norwich*, 118 U. S. 468, Mr. Justice Bradley, at page 504, in dealing with the question whether insurance moneys had to be surrendered, says:

> "We are not only satisfied that the law does not compel the shipowner to surrender his insurance in order to have the benefit of limited liability, but that a contrary result would defeat

the principal object of the law. That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment * * *."

Later, in *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, at page 549, he gives the ground of the law of limited liability of shipowners:

"* * * That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. It extends to liability for every kind of loss, damage and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law. * * *"

And in 130 U. S. at page 550, he says:

"Various attempts have been made to narrow the objects of the statute, but without avail. It was first contended that it did not apply to collisions. This pretence was disallowed by the decision in *Norwich Company* v. *Wright*, 13 Wall. 104. Next it was insisted that it did not extend to cases of loss by fire. This point was overruled in the case of *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. Now it is contended that it does not extend to personal injuries as well as to injuries to property. If this position can be maintained the value of the act, as an en-

> couragement to engage in the shipping business, will be very essentially impaired. The carriage of passengers in connection with merchandise is so common on the great highway between the old and new continents at the present day, that a law of limited liability, which should protect ship-owners in regard to injuries to goods and not in regard to injuries to passengers, would be of very little service in cases which would call for its application."

As to the purpose of the Limited Liability Acts, Mr. Justice White in *La Bourgogne*, 210 U. S. 95, at pages 120-121, quotes with approval the opinions of Mr. Justice Nelson and Mr. Justice Bradley in *Moore* v. *American Transportation Company*, 24 How. 1, 39, and *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, 589, respectively.

Richardson v. *Harmon*, 222 U. S. 96, is another late case in which the purpose and effect of these laws is dealt with at length. In that case, Mr. Justice Lurton makes the following pertinent remarks at pages 103-104:

> "* * * The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. * * *"
>
> "In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the

Government was to confine the risk of an owner not personally at fault to his interest in the ship * * *."

In *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, this court in holding that the New York Workmen's Compensation Law could not, under the Constitution, apply to injuries received on board vessels, mentioned the fact that the absolute liability under the Workmen's Compensation Law was

> "* * * not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (Rev. Stats., §§4283-4285; Section 18, Act of June 26, 1884, c. 121, 23 Stat. 57) which declare a limitation upon the liability of their owners. *Richardson* v. *Harmon*, 222 U. S. 96, 104." *Page* 218.

In the recent case of *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 334, the right to limit was denied to the owners on the ground they were privy to the unseaworthiness which was the cause of the loss and also had made personal contracts against which they were not entitled to limit. However, Mr. Justice Holmes in delivering the opinion of the court sounded a warning and said at page 336:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. * * *"

For the court's convenience, a list of the cases chronologically arranged in which this court has dealt with limitation of liability acts, is hereto annexed as *Appendix IV* hereof.

This long list of cases is eloquent proof that limitation of liability statutes play a most important part in our maritime law.

The quotations above given show that these statutes have for years been treated with the greatest hospitality by this court, because of the important public policy which lay behind their enactment.

SECOND POINT.

THE PROPER PROCEDURE FOR OBTAINING THE BENEFIT OF THE LIMITED LIABILITY LAW IS FULLY OUTLINED IN THE DECISIONS AND RULES OF THIS COURT. A LIMITATION OF LIABILITY PROCEEDING MUST NECESSARILY BE EXCLUSIVE IN ORDER TO GIVE THE SHIPOWNER THE REMEDY AND RELIEF INTENDED BY CONGRESS.

After one or two litigations arising under the Act of 1851 had reached this court, rules were passed by this court on May 6, 1872, laying down the procedure to be followed by shipowners for the enforcement of the remedies given to them by the Act of 1851. 13 Wall., page XII.

These old rules were amended on December 6, 1920, to take effect March 7, 1921. 254 U. S. 703.

For the convenience of the court the text of the amended rules which were in force at the time this case arose are appended hereto as *Appendix III.*

In *The San Pedro,* 223 U. S. 365, this court wrote at page 371:

> "* * * This court, in furtherance of the apparent purpose of Congress to limit the liability of vessel owners (Revised Statutes, Sections 4283-4285) has, by that rule, prescribed how an owner may avail himself of the benefit of the statute. *The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship.* The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case.
>
> "The appellant, owner of the *San Pedro,* appears to have proceeded strictly in compliance with the fifty-fourth admiralty rule. There was a due appraisement of the *San Pedro* and her pending freight, and a stipulation entered into, with sureties, for the value so appraised, and monition duly issued, requiring all persons to present their claims and make proof. *In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every other court, Federal or State, to stop all further proceedings in separate suits upon claims to which the limited liability act applied."* (Italics are ours.)

In *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, this court wrote, at page 587:

> "The principal question in this case is, whether the institution of proceedings in the District Court of the United States, under the Act of 1851, for procuring a decree of limited liability of the owners of *The Oceanus*, the defendants in the present action, for the losses and injuries to goods on board of the vessel, superseded the prosecution of claims for the same losses and injuries in other courts. It seems to us that this must be the necessary effect of such proceedings, and that this results as well from the language of the law, as from its object and purpose."

In the case of *Norwich Company* v. *Wright*, 13 Wall. 104, this court wrote, at page 125:

> "The proper course of proceeding for obtaining the benefit of the Act would seem to be this: When a libel for damages is filed, either against the ship *in rem* or the owners *in personam*, the latter, whether with or without an answer to the merits, should file a proper petition for an apportionment of the damages according to the statute, and should pay into court, if the vessel or its proceeds is not already there, or give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the ship owner will be entitled to a monition against all persons to appear and intervene *pro interesse suo*, and to an order restraining the prosecution of other suits.

> If an action should be brought in a state court, the ship owners should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court, *or procure an order from the district court to restrain the further prosecution of the suit.* * * *" (Italics ours.)

Admiralty rule 51, after setting forth that a shipowner desiring to claim the benefit of limitation of liability under the Act of 1851 shall file a petition in the proper district court setting forth the facts and circumstances on which said limitation of liability is claimed, outlines the procedure incident thereto and provides that

> "* * * the said court *shall* also, on the application of the said owner or owners, make an order to restrain the further prosecution of *all and any* suit or suits against said owner or owners in respect to any such claim or claims." (Italics are ours.)

This rule was promulgated by this court on December 6, 1920 (254 U. S. 674)—shortly after the enactment of section 33 of the Merchant Marine Act of 1920 referred to in the certified questions.

This court had power delegated to it by Congress to promulgate the rule,* and by so doing expressed its deliberate judgment as to the procedure proper to be followed.

Providence & N. Y. S. S. Co. v. *Hill Manufacturing Co.*, 109 U. S. 578.

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* Act of August 23, 1842, Chap. 188, Section 6; 5 Stat. 518, Rev. Stat., §§862, 917, 918.

The effect of the Limitation of Liability Act, therefore, was the creation in the Admiralty Court of a remedy based on the theory that public policy requires that shipowners, whose vessels cause a great variety and extent of damage, shall be entitled to have a proceeding in a proper case wherein they may assemble all the persons who may have been damaged by any maritime disaster and require them to try out the case in concourse.

The theory of this proceeding is that, as there was one wrong committed by the shipowner, he is entitled to have a remedy somewhat analogous to the old Bill of Peace in equity to enable him to try out his liability as against everyone interested in the one proceeding.

Otherwise he would be called on perhaps to meet the different claims, some before juries, in different courts of different states, with a probable, or at least possible, variance of result.

When the extent of the damages and the number of cases involved in any great maritime disaster are remembered, it is easily seen that it is impracticable to deal with cases of this kind otherwise than by trying them as one with a concourse of all claimants in the limitation proceeding.

The most graphic instances showing the necessity of such proceedings are perhaps the cases of *La Bourgogne*, 210 U. S. 95, of *The Titanic*, 233 U. S. 718 and of *The Lusitania*, 251 Fed. 715, where hundreds of claims involving millions of dollars were made against the shipowner in many different states.

It would be a practical impossibility for a shipowner in the event of a disaster to handle cases in which several seamen had claims under §33 along the lines which have been outlined in decisions rendered by some of the lower courts.

For example, if each case by a seaman had to be tried separately by a jury, the result might very possibly be that in one case there would be a recovery against the ship and in another there would be a decision in the shipowner's favor.

If a limitation proceeding involving others than seamen was proceeding at the same time with seamen's cases at law, very possibly the court on the admiralty side might decide against the shipowner, and on the law side of the same court a judgment on a jury's verdict might go in favor of the shipowner, or *vice versa*.

These are some of the suggested possible results which would be extremely difficult to work out judicially in an orderly fashion.

The orderly and consistent administration of justice can be conserved only by trying out limitation proceedings by concourse of all claimants.

The injunction or stay is the only weapon by which process of round-up can be achieved.

In *The F. H. Marvin*, 1924 American Maritime Cases, 53, decided December 11, 1923, by the United States District Court for the Western District of Washington, a motion to vacate a stay of state court proceedings, on the ground that Section 33 of the Merchant Marine Act overrode a shipowner's remedy in limitation of liability, was properly denied.

The court there rightly held that the promulgation by this court, after Section 33 of the Merchant Marine Act of 1920 was passed by Congress, of the new admiralty rules of March 7, 1921, 250 U. S. 703, 705, was in effect subsequent legislation, which, so far as limitation of liability suits were concerned, constituted a reiteration of policy, and imposed on a district court sitting in admiralty the *duty* to issue an injunction provided for in those rules.

The procedural situation as to claims under Section 33 of the Merchant Marine Act, 1920, which has been created by the decisions of Judge Garvin in the present case, of Judge Learned Hand in the cases of *The El Mundo*, *The Frederick Luckenbach* and *The Hewitt*, 294 Fed. 577, and of Judge Partridge in the case of *In re Charles Nelson Co.*, 294 Fed. 926, is hopelessly confusing.*

In *The El Mundo*, the court was of the opinion that, even if there was left to the owner a right to limit,

> "the owner-employer must make his defense in the action at law, and that, if there are other claims on which he relies to reduce the plaintiff's recovery, he must prove those in that action. Such proof will not, of course, estop those other claimants, and in so far the owner remains in peril; but that is essential if he is deprived of his remedy of a concourse under Rev. Stat., Section 4285, and the rules * * *." *per* Learned Hand, J., 294 Fed. 581.

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* Since this brief was in type the case of *In Re Charles Nelson Co.* has been reversed by the Circuit Court of Appeals for the Ninth Circuit in an opinion which supports the contentions made in this brief. A copy of this opinion is hereto annexed as *Appendix VII* hereof.

The confusion attendant upon the adoption of such a theory, which would compel an owner with a total of many claims against him to prove all the other claims against himself on the trial of each and every one of the claims composing the total, is so manifest as hardly to require demonstration.

If, for example, there is a case where there are 20 or 30 seamen maintaining separate actions at law as in the case of *The Hewitt*, 294 Fed. 577, it would be practically impossible to raise the question of limitation of liability in one of these jury cases, as Judge Hand has suggested, without admitting liability in respect of all the other cases.

The situation would be quite hopeless and in respect of such claims limitation of liability would be practically destroyed.

In the case at bar, upon resettlement of the decree of January 27th, 1923, and after that recital in the proposed decree setting forth that Congress by the Jones Act intended to change the law with respect to limitation of liability, Judge Garvin inserted the words "*to the extent of allowing a trial by a jury to said plaintiff.*" As appellant views this alteration, it indicates an interpretation of the law which is wholly inconsistent with the ruling expressed by the resettled decree. The words seem to reveal an opinion of the court which is far less sweeping than the decision, an opinion only that a claimant is entitled to have his damages assessed by a jury.

In order to remind the court of the usual steps taken in a limitation proceeding and to illustrate its compli-

cated nature and the practical necessity of having all the claimants in concourse, we have drawn up and annexed to this brief a memorandum detailing the steps in such a proceeding, as *Appendix V* hereof.

It is somewhat unusual to have all the practice proceedings in limitation set forth in a record on appeal, because generally by the time the appeal comes most of the practice questions have become unimportant. In the case of *La Bourgogne*, 210 U. S. 95, however, the transcript of record on file in this court seems to show most, if not all, of the practice papers referred to in *Appendix V*.

It is submitted that a petition for limitation of liability is necessarily an exclusive remedy, and that trial of all the issues in concourse in an admiralty court is of the essence thereof.

THIRD POINT.

THE MERCHANT MARINE ACT OF 1920, COMMONLY KNOWN AS THE JONES ACT, DID NOT CHANGE THE LAW PERMITTING SHIPOWNERS TO LIMIT THEIR LIABILITY.

1. *The Purpose of the Merchant Marine Act of 1920.*

The Merchant Marine Act of 1920 was passed as expressed in its preamble for the primary purpose of developing and encouraging and maintaining a United States Merchant Marine. The title of the Act and its

preamble express this purpose as clearly as words can. They are as follows:

"An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and *it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine*, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained." (Italics ours.)

Section 2, in which there were provisions repealing certain other acts and parts of acts, does not mention the limitation of liability statutes.*

2. *Section 33 of the Merchant Marine Act and its Effect on Seamen's Rights.*

Section 33 of the Jones Act (Merchant Marine Act of June 5, 1920; U. S. Comp. St., 1923 Supp., Section 8337a; 41 Stat. 1007) reads as follows:

"Section 33: That Section 20 of such Act of March 4th, 1915, be, and is, amended to read as follows:

'Section 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action

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* The repealing provisions are as follows:

"Sec. 2 (a) That the following Acts and parts of Acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled 'An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes,' approved June 15, 1917, as amended by the Act entitled, 'An Act to amend the emergency shipping fund provisions of the Urgent Deficiency Appropriation Act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes,' approved April 22, 1918, and as further amended by the Act entitled, 'An Act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes,' approved November 4, 1918:

(2) Section 3 of such Act of April 22, 1918;

(3) The paragraphs numbered 2 and 3 under the heading 'Emergency shipping fund' in such Act of November 4, 1918; and

(4) The Act entitled 'An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes,' approved July 18, 1918.

(5) Sections 5, 7, and 8, Shipping Act, 1916."

for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' "

It is observable at this point that the statute properly applies only to *American* ship owners owing to its provisions as to venue.

The first provision of this section is that any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury.

Under the general maritime law, in case of illness or injury, a seaman may recover wages, maintenance and cure. This right exists irrespective of his or the owner's negligence, and will be denied only in case of his willful misconduct.

If his injury flows from the owner's negligent failure to furnish a seaworthy ship, or from a failure to furnish proper medical or surgical attendance, the seaman may

recover full indemnity, except as his recovery may be diminished by contributory negligence or possibly in some cases barred by assumption of risk.

The old maritime law may be enforced in either a federal or a state court, with a trial by jury if the plaintiff chooses to bring his action in the state court or on the law side of the federal court.

Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255;
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372;
The Iroquois, 194 U. S. 240;
The Osceola, 189 U. S. 158;
Scarff v. *Metcalf*, 107 N. Y. 211.

Even before the Jones Act, then, under circumstances involving fault attributable to the owner, a seaman could have the benefit of trial by jury and recover full indemnity. This was a right to "maintain an action for damages at law, with the right of trial by jury."

The Jones Act in terms gives this same right, but there is nothing in the wording of the act to indicate that the right and its exercise are to be absolute and free of the restrictions imposed by the Limited Liability Law, enacted by Congress more than seventy years ago.

The purpose of this phrasing was obviously to make clear at least that federal courts sitting on the common-law side were to take cognizance of the new maritime rule laid down in the statute.

Thus in the first part of §33 there is not anything new.

The striking innovation furnished by §33 is contained in the provision making applicable "in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees."

This court has made clear the significance of this reference in *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, where it said at page 391:

> "• • • The reference, as is readily understood, is to the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and its amendments • • •."

The Federal Employers' Liability Act abolishes the defense of fellow servant, and that of assumption of risk "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee" (35 Stat. 66; Comp. St. §8660), and provides that contributory negligence shall diminish but not bar a recovery.

In its opening paragraph, it provides (U. S. Comp. St., 1918, Section 8657; 35 Stat. 65):

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the

States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment. (April 22, 1908, c. 149, Section 1, 35 Stat. 65.)"

Before the enactment of §33 of the Merchant Marine Act a seaman's action was not barred by contributory negligence; and the defense of assumption of risk had been largely if not entirely whittled away, for the reason that a seaman acting under orders cannot be deemed voluntarily to assume a risk which he is bound to undertake.

Those two features of the Federal Employers' Liability Act, as applied to seamen, would seem, therefore, to constitute a mere statutory declaration of principles already applicable to seamen's cases.

The outstanding feature of the act which materially changes or purports to change the rights of a seaman is the provision abolishing the fellow servant rule as a

defense. This had been ineffectually attempted in §20 of the Seaman's Act. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.

That feature has no relation to the principle involved in the statute of 1851 limiting the aggregate amount of recovery against a ship owner to the value of the vessel and pending freight.

The two principles do not conflict. Both continue in force at the same time. Each has its own sphere of operation.

One forms a part of the rules by which is determined the presence or absence of legal liability on the part of the employer; the other relates to the aggregate amount that an employer who has been found legally liable shall be made to pay.

The Federal Employers' Liability Act authorizes an action by the injured employee or, in case of his death, by his personal representative. No right to trial by jury is expressly given, but must be implied from the language of the provision that "contributory negligence shall not bar a recovery, but the damages shall be diminished *by the jury*," etc. (Comp. St. 1918, Section 8659; 35 Stat. 66). These last mentioned provisions are substantially identical with the express provisions of the Jones Act.

The Circuit Court of Appeals for the Second Circuit has held, in *The Passaic*, 204 Fed. 266, that the Federal Employers' Liability Act does not by implication repeal the statutory provisions permitting shipowners to limit

their liability, or affect the right of the owner to maintain proceedings for such limitation in a court of admiralty.

It is to be observed that by reason of their very nature many provisions of the "statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees" do not apply to actions by seamen, and cannot be made to apply, the fiat of Congress to the contrary notwithstanding.

A seaman is not concerned with defects in railroad tracks, cars, locomotives or roadbeds, provision for which is made in the section of the Employers' Liability Act hereinabove quoted. He is not concerned with driving-wheel brakes and safety ash pans on locomotives, automatic couplers and grab irons on railroad cars, or drawbars on freight cars, provision for which is made in the "Safety Appliance Acts" (U. S. Comp. St., 1918, Sections 8605-8650; 27 Stat. 531; 36 Stat. 298; 35 Stat. 476).

In these circumstances it is not too much to say that Congress understood that the sweeping language employed in this statute must of necessity be limited by many exceptions not therein expressed or suggested.

Without attempting to discuss the wisdom of this form of legislation, the result of it is plainly to cast upon the courts the burden of determining what changes in the maritime law were intended and effected.

Manifestly it was not intended to abrogate all principles theretofore recognized and enforced by courts of admiralty, statutory and otherwise.

It was not intended to wipe out the whole body of maritime law and procedure and substitute another completely new system in its place.

Rather it must have been intended to supplement the existing maritime law by importing into it additional rules to be applied in determining the liability or non-liability of the employer.

3. *The Status of §33 in our Maritime Jurisprudence has been settled by this Court.*

The true construction to be placed on Section 33 of the Merchant Marine Act, 1920, has been so recently laid down by this court in the case of *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, that it would seem hardly necessary to labor at great length the question of the place which the Act finds in our maritime law.

Mr. Justice Van Devanter said in writing the opinion in that case at page 388 (italics ours):

> *"Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system,"*

and again at pages 390, 391 (italics ours):

> "The course of legislation, as exemplified in §9 of the Judiciary Act of 1789, §§563 (par. 8) and

711 (par. 3) of the Revised Statutes, and §§24 (par. 3) and 256 (par. 3) of the Judicial Code, always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings *in personam* as a matter of admissible grace. *It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,*— that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says 'may maintain' an action at law 'with the right of trial by jury,' the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words 'in such action' in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it. A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of 'an action to recover damages for

such injuries,' the emphasis being on the object of the suit rather than the jurisdiction in which it is brought. So we think the reference is to all actions brought to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure. See *The Osceola*, 189 U. S. 158; *The Iroquois*, 194 U. S. 240; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. In this view the statute leaves the injured seaman free under the general law—§§24 (par. 3) and 256 (par. 3) of the Judicial Code—to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, but if he sues on the common-law side there will be a right of trial by jury. *So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning.*"

The remarks quoted above from the decision in the *Panama Railroad* case seem to indicate that, in the court's opinion, Section 33 of the Merchant Marine Act, 1920, created new rules of liability as between seamen and shipowners, and thus that the substantive nature of the relationship and relative rights of seamen and shipowners were modified.

At the same time, moreover, it seems to be clear from this opinion that these rules of liability were enforceable, either at common law with a jury "as an incident", or in admiralty before the court.

The statute thus construed merely places seamen in a remedial status the same as that in which they have always been.

They could always bring a common law action to enforce their substantive rights and the shipowners' liability. The jury was not a part of the *right* conferred, but merely a part of the machinery of the remedy which would be granted when an action at law was brought.

On the other hand, a petition for limitation of liability is also a remedy which is available to the shipowner without in any way affecting the *rights* of the seamen under Section 33. All that is affected is the *form* of the seamen's remedy.

There has never been a right of trial by jury in the admiralty.

The Constitution originally did not give any trial by jury. Trial by jury was granted in the sixth amendment for criminal prosecutions, and in the seventh amendment for actions at common law in the federal courts in which the controversy exceeds $20.00 in amount.

Furthermore Congress in 1787, Revised Statutes 648, excluded juries from proceedings under equity and admiralty jurisdiction.

Decisions of this court have uniformly sustained this procedure.

Whelan v. *United States*, 7 Cranch. 112; affirming *The Vengeance*, 3 Dallas 297;
The Sarah, 8 Wheat. 391;
The Sally, 2 Cranch. 406;
The Betsey and Charlotte, 4 Cranch. 443.

Indeed, it would seem that inasmuch as the court has now construed Section 33 of the Merchant Marine Act to have become part of the maritime law, all question of any alleged *right* to a jury trial has been excluded.

Indeed, it is difficult to understand on what the alleged *right* to a jury trial, under such a situation as exists in this case, could be based, except on a constitutional provision.

So far as the admiralty court is concerned, there is not any such provision, and, consequently, when a shipowner is in a position to invoke an admiralty remedy in the admiralty court, the fact that a jury might be available in another forum seems to have nothing whatever to do with the matter.

4. *There was not any Repeal of the Limitation Act by Implication.*

The Merchant Marine Act does not expressly repeal the Limited Liability Law.

It does repeal certain enumerated acts and parts of acts, in five main subdivisions of Section 2, but no mention is made of the Limited Liability Law. Recourse may then be had to the well established rule (stated in *Soliss* v. *General Electric Co.*, 213 Fed. 204, 207):

> "• • • the enumeration of certain members of a class is the exclusion of all others of that class not enumerated, • • •"

and no doubt is left that Congress never intended to modify or repeal the Limited Liability Law.

When Congress in 1884 determined to exempt seamen's wages from the operation of the limited liability statute, (doubtless because they were regarded as personal contracts of the owner) it did so in specific terms and by appropriate amendment of said statute (U. S. Comp. St., 1918, Section 8028; 23 Stat. 57).

It is axiomatic that repeals by implication are never favored.

Frost v. *Wenie,* 157 U. S. 46, 58;
United States v. *Greathouse,* 166 U. S. 601, 605;
Washington v. *Miller,* 235 U. S. 422, 428;
Nichols & Cox Lumber Co. v. *United States,* 212 Fed. 588, 590;
Kemp Lumber Co. v. *Howard,* 237 Fed. 574, 576;
Franke v. *Murray,* 248 Fed. 865, 869;
Grahl v. *United States,* 261 Fed. 487, 492.

In *Arthur* v. *Homer,* 96 U. S. 137, 140, this court wrote:

> "To induce a repeal of a statute by the implication of inconsistency with a later statute, there must be such a positive repugnancy between the two statutes that they cannot stand together."

To find a repeal by implication, that implication must be the necessary deduction from the later statute.

Laws are presumed to be passed with deliberation and with full knowledge of all existing laws within the scope

of the proposed legislation, and it is but reasonable to conclude that the legislative body, in passing a statute, intended no interference with or abrogation of any former statute, unless the repugnancy between the two is manifestly irreconcilable.

Under the rule of implied repeals it must be impossible to execute both laws, before such repeal exists. If the two statutes can be construed so as to be reconcilable, that construction should be taken rather than one which effects repeal of the earlier law; the two statutes must stand together, and effect must be given to both.

Wilmot v. *Mudge*, 103 U. S. 217, 221;
Frost v. *Wenie*, 157 U. S. 46, 58;
United States v. *Healey*, 160 U. S. 136, 147;
United States v. *Greathouse*, 166 U. S. 601, 605;
United States v. *Lee Yen Tai*, 185 U. S. 213, 221;
Soliss v. *General Electric Co.*, 213 Fed. 204, 208;
Witte v. *Shelton*, 240 Fed. 265, 268;
Reo Atlanta Co. v. *Stern*, 279 Fed. 422, 424.

The two statutes here under consideration are not so hostile that both cannot stand. There is no such palpable repugnancy of the one to the other that a reading of the two acts together indicates an obvious intention of the legislative body that both could not remain in force at the same time.

The claim that acts giving new rights against or imposing new liabilities on shipowners have repealed in part, at least, the Limitation of Liability Acts is not a novel contention.

But in every instance where this contention has been made the courts have disapproved it.

Chappell v. Bradshaw, 35 Fed. 923, held that Section 18 of the Act of June 26, 1884, did not repeal by implication the preceding limited liability acts set forth in Revised Statutes, Sections 4282 to 4289.

At page 925, Judge Bond said:

> "* * * Where a subsequent statute can be so construed as not to bring it in direct conflict with an antecedent law, it will not be held by the courts to repeal the former statute. Repeals by implication are seldom allowed and to do so in this instance would be to do violence to the intention of Congress, which appears clearly to have been to extend the Act of 1851 to exempt ship owners from liabilities not embraced in that Act, but not to embrace another class of vessel owners."

In the case of *The Hoffmans*, 171 Fed. 455, it was contended that the Act of June 29, 1906, Chap. 3591, Sec. 7, 34 Stat. 595, which read:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor *and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it* or by any common carrier,

railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, *and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed*; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law" (italics ours),

repealed the statute for limitation of liability as to any cases coming under it.

The case for an implied repeal was much stronger than the instant case, because Section 10 of the Act of June 26, 1906 provided:

> *"That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but* the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." (Italics ours.)

The court, Adams, J., held there was not any implied repeal of the limitation acts and said at page 465:

> "In the Middle Ages, the doctrine of limitation of liability of the owners of a vessel to their interests in its value and the value of its freight, arose. In *The Rebecca*, Fed. Cas. No. 11,619, 20 Fed. Cas. 373, decided in the District of Maine in 1831, Judge Ware treats the matter in an exhaustive manner. The first statutes of the United States upon the

subject were passed in 1851, and became known as the 'Limited Liability Acts'. They are found in Sections 4282-4289 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2943, 2945). The policy of these acts is explained by Mr. Justice Bradley in *Norwich Co.* v. *Wright*, 13 Wall. 104, 121, 20 L. Ed. 585.

* * * * * *

"The Interstate Commerce Act aimed to correct certain abuses in the carriage of goods, principally by land, incidentally by water, but it was certainly not designed to overthrow the long established system of limitation of vessel-owners' liability in connection with water carriage. To suppose so, without any mention of the Act of 1851, would be a perversion of its obvious intent to correct the said abuses. I do not find any merit in the claim."

In *The Passaic*, 204 Fed. 266, the Circuit Court of Appeals for the Second Circuit held that the limited liability acts were not impliedly repealed by the Employers Liability Act of April 22, 1908.

The attitude of the courts in construing acts which are in *pari materia*, and, particularly, in following out the supposed intention of Congress to allow shipowners to limit their liability, as set forth in the various limited liability statutes, is clearly set forth in the words of Ward, C. J., at page 267:

"* * * If the limited liability acts and the acts regulating the liability of such railroads to their employees can be construed consistently with each other, so that both shall stand, they must be so

> construed. What shocks the mind is that whereas full compensation can be had in the case of employees of such a railroad company killed or injured on shore, often a partial compensation or none at all can be had in the case of employees killed or injured on a vessel of the railroad company. Still this is the very distinction which Congress has made and for many years permitted to stand between liability of defendants generally for loss of or injury to persons or property on shore and liability of vessel owners for the same injuries. The Acts of Congress regulating the liability of railroads to their employees do not affect the cause of action in any way, but abolish certain defenses, such as contributory negligence and assumption of risk. This is entirely consistent with previous legislation limiting the extent of the employers' liability for the cause of action."

In *Alaska Steamship Co.* v. *United States*, 259 Fed. 713, it was held by the Circuit Court of Appeals for the Second Circuit that no power was given to the Interstate Commerce Commission by the Interstate Commerce Act of February 4, 1887,

> " * * * to prescribe an inland bill of lading in form or substance depriving the carriers of the benefits of the statutes limiting the liability of vessel owners and of Harter Act of February 13, 1893, c. 105, 27 Stat. 445 (Comp. St. Sections 8029-8035). These statutes still survive, unless repealed by implication, and this result we are of the opinion, was neither intended nor accomplished." 259 Fed. 715.

It is true that this case was reversed in *United States v. Alaska Steamship Company*, 253 U. S. 113. But the reversal was based on the fact that the Transportation Act of February 28, 1920, passed pending the appeal, had rendered the questions involved below moot questions, and hence that this court would not deal with the question of an implied repeal of the limited liability statutes.

In the case of *Butler v. Boston Steamship Co.*, 130 U. S. 527, it was contended that the Act of February 28, 1871, entitled *"An Act to Provide for Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam, and for other Purposes"*, commonly called the Steamboat Inspection Act, 16 Stat. at L. 440, superseded or displaced the proceedings for limited liability in certain cases. The court said, at page 553 (italics ours):

"* * * We do not see the necessity of drawing any such conclusion. *The act itself contains no provision of the kind.* It requires certain precautions to be taken by owners of coasting steam-vessels and those engaged in navigating them to avoid as far as possible danger to the lives of passengers. Amongst other things, by the 51st Section of the Act (Rev. Stat., sec. 4401), it is provided that all coastwise seagoing steam vessels 'shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.' By the 43d section (Rev. Stat. sec. 4493) it is declared that whenever damage is sustained by a passenger or his baggage,

the master and owner, or either of them, and the vessel shall be liable to the full amount of damage if it happens through any neglect or failure to comply with the provisions of the Act, or through known defects, etc. This is only declaring in the particular case, what is true in all, that if the injury or loss occurs through the fault of the owner, he will be personally liable, and cannot have the benefit of limited liability. *But it does not alter the course of proceeding if the claim of limited liability is set up by the owner.* * * *"

It is to be noted that section 33 of the Merchant Marine Act of 1920 does not contain language nearly so strong as that contained in the Act of February 28, 1871, under discussion by Mr. Justice Bradley. That act read in part (italics ours):

"Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the *full amount of damage if it happens through any neglect or failure to comply with the provisions of this title,* or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damages for any such injury caused by any such mas-

ter, mate, engineer or pilot. (R. S., Sec. 4493; Comp. St. 8269; Act. Feb. 28, 1871, c. 100, Sec. 43, 16 Stat. 453.)" (Italics ours.)

Section 33 of the Merchant Marine Act sets up a general rule that seamen shall have certain new substantive rights.

The limitation of liability statutes provide that, in cases where the total of the claim or claims exceeds the value of the ship and freight, that value shall represent the maximum amount for which the shipowner shall be liable.

Under usual and ordinary circumstances, and in the absence of an occasional and exceptional disaster such as that out of which the pending controversy arose, a seaman can take advantage of the provisions of the Merchant Marine Act and suffer nothing by reason of the Limited Liability Law.

Only in a small fraction of the total number of cases is injury to or death of a seaman accompanied by destruction of the vessel, partial or complete, or by a number of other casualties giving rise to claims aggregating an amount in excess of the value of the vessel and her freight.

His possible collision with the Limited Liability Law is fairly analogous to any creditor's position with reference to the bankruptcy statutes; the creditor has a general right to collect in full, but under certain special circumstances he is restricted to a *pro rata* share in a limited fund.

The application of the Limited Liability Law is not confined to cases involving claims of seamen.

It applies to cases involving claims of passengers (*Butler* v. *Boston Steamship Co.*, 130 U. S. 527; *Craig* v. *Continental Ins. Co.*, 141 U. S. 638; *The Titanic*, 233 U. S. 718), of owners of another ship sunk in collision (*Norwich Company* v. *Wright*, 13 Wall. 104; *The Scotland*, 105 U. S. 24), of shippers (*Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578), of salvage claimants (*The San Pedro*, 223 U. S. 365), of stevedores (*The Harry Hudson Smith*, 142 Fed. 724; *Flynn* v. *Christenson*, 273 Fed. 385), of the government of the United States (*United States* v. *Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 212 Fed. 40), of owners of a bridge struck by a barge and of any claimants seeking damages for a non-maritime tort (*Richardson* v. *Harmon*, 222 U. S. 96). "It extends to liability for every kind of loss, damage and injury." *Butler* v. *Boston Steamship Co.*, 130 U. S. 527.

These various parties—passengers, owners of other ships, shippers, salvage claimants, stevedores, the government, bridge owners, and even a pedestrian on shore struck by a flying fragment of an exploded boiler—must come into a limitation proceeding to assert their claims, although quite obviously they would have no concern with any of the provisions of the Merchant Marine Act.

Also, as hereinabove pointed out, the great majority of injured seamen would never be in collision with the Limited Liability Law.

There is then no identity between the field of operation of the one statute and that of the other which could serve as a basis for a conclusion that the later act was intended to repeal the earlier.

Both laws are possible of execution in their respective spheres and effect must be given to both.

Passengers and the other classes hereinabove enumerated have a right to a jury trial and full indemnity, but that right is always held subordinate to a shipowner's right to limit his liability.

Now, when a seaman is in terms given a right to a jury trial and full indemnity, it is presumably for the purpose of granting him rights *equal* to those of the other classes.

The Jones Act is without words of preference which would indicate an intent to grant him *greater* rights. The provision as to jury trial was put in to make it clear that the new maritime law was to be enforced on the common law side of the court, and that the usual defences should not apply in seamen's cases in common-law courts.

A general group, embracing all classes except seamen, enjoyed certain rights subject to certain limitations, and Congress by the Merchant Marine Act included the excepted class in that general group.

The seaman is then on the same plane as the other members of that general group. If he sues at common law he has the usual right to a jury trial and full indemnity, but that right is subject to a shipowner's right to limit his liability in a proper case by a proceeding in admiralty.

The two statutes are repugnant to each other only in the sense that the ordinary remedies exercisable under the later will under certain special circumstances be stopped by the extraordinary remedy provided in the earlier. But those same remedies, when exercised by a general group to which seamen have now been expressly joined, have for seventy-three years suffered that identical curtailment with the express sanction of this court.

Adverting to the presumption that laws are passed with deliberation and with full knowledge of all existing laws within the scope of the proposed legislation, it is but reasonable to conclude that Congress, when it passed the Jones Act and thereby included seamen within the general group possessed of a right to jury trial and full indemnity, was well aware of the curtailment or limitation to which that right had for almost three-quarters of a century been subjected; and that, Congress having failed to insert words of preference indicative of a desire to favor seamen over other members of the group, no interference with or abrogation of that statutory limitation was intended.

The principle of limitation of liability of shipowners has, indeed, now become such an ancient and fundamental part, not only of our own maritime jurisprudence, but as above noted of the jurisprudence of all maritime nations, that it is perhaps appropriate to recall in this connection what Sir Matthew Hale, Lord Chief Justice of the King's Bench, 1671-1676, the earliest great historian of English Law, said of old laws in his "*Considerations*

Touching the Amendment or Alteration of Laws," Hargrave's Law Tracts, 253-289.

At page 254 he said (italics ours):

> "Ancient laws that have a common concern, are not the issues or the produce of this or that council or senate, but they are the production of the various experiences and applications of *the wisest thing in the inferior world—to wit, Time.*"

To show how our Senate dealt with this law, and to emphasize a hundred fold the wisdom of Sir Matthew Hale's remarks, we have prepared and annexed hereto as *Appendix VI* hereof a statement of all the proceedings had in the Congress and its committees regarding the amendment of Section 20 of the Seamen's Act by Section 33 of the Merchant Marine Act, 1920.

It shows quite clearly that it was not intended that the Limited Liability Act should be affected by this amendment, but merely, as its proponent claimed, to do away with the rule of assumption of risk and the doctrine of fellow servant.

As the record shows, the amendment seems to have been passed with very little consideration.

It would be singular, indeed, if a casual act of this kind should be held to have overturned our settled maritime policy of limitation of liability for shipowners, which has existed and been enforced now, for almost seventy-five years.

The appellee has argued that Section 6 of the Federal Employers' Liability Act, forbidding removal of a case arising under the act from a state to a federal court, is

incorporated by reference into the Merchant Marine Act, and that appellant's proceeding to limit its liability is a removal.

The answer is obvious. Appellant's proceeding is not a removal of the appellee's state court action; it is an entirely new proceeding in a new forum in arrest of that state court action.

In *Providence & N. Y. S. S. Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, this court, in disposing of the argument that inconveniences may arise from arresting the prosecution of separate suits, said at page 596:

> "Nor is the inconvenience any greater than that which occurs when a case is removed from the State to a federal court. In that case, on the presentation of a petition for removal, * * * the law declares 'It shall then be the duty of the State court to * * * proceed no further in such suit.' In the case before us, as well as in the cases of bankruptcy and of removal, the parties have a right", etc.

This language indicates beyond question that a limitation proceeding is a thing separate and distinct from a removal.

It is then unnecessary to consider appellee's argument that Section 6 is incorporated in the Jones Act; although it may be noted that an action at law in a state court, brought by a seaman under that act, has been held removable into a federal court.

Wenzler v. *Robin Line S. S. Co.*, 277 Fed. 812.

The limitation of liability acts deal with remedies, not with substantive rights.

In the case of *Butler* v. *Boston Steamship Co.* 130 U. S. 527 (1888), Mr. Justice Bradley in speaking of a personal injury case which had been brought against the steamship company, said at page 552:

> "* * * Had the action of the appellants been first commenced, it would have been suspended by the institution of the limited liability proceedings; and the very object of those proceedings was, not only to stop the prosecution of actions already commenced, but to prevent other suits from being brought. Allegations that the owners themselves were in fault cannot affect the jurisdiction of the court to entertain a cause of limited liability, for that is one of the principal issues to be tried in such a cause. The beneficent object of the law in enabling the ship-owner to bring all parties into concourse who have claims arising out of the disaster or loss, and thus to prevent a multiplicity of actions, and to adjust the liability to the value of the ship and freight, has been commented on in several cases that have come before this court, notably in the cases of *Norwich Company* v. *Wright*, 13 Wall. 104, and *Providence and New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. It is unnecessary to enter again upon the discussion here."

Again, after holding that the Steamboat Inspection Act, February 28, 1871 did not repeal the statute by implication, Mr. Justice Bradley said at page 553:

> "* * * But it does not alter the course of proceeding if the claim of limited liability is set up

by the owner. If, in those proceedings, it should appear that the disaster did happen with his privity or knowledge, or, perhaps, if it should appear that the requirements of the steamboat inspection law were not complied with by him, he would not obtain a decree for limited liability; that is all. We say 'perhaps', for it has never yet been decided, at least by this court, that the owner cannot claim the benefit of limited liability when a disaster happens to a coast-wise steamer without his fault, privity, or knowledge, even though some of the requirements of the steamboat inspection law may not have been complied with. * * *"

In the case of *The Titanic,* 233 U. S. 718, in dealing with the question of limitation of liability statutes, Mr. Justice Holmes said on page 733:

"* * * This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. *Emery* v. *Burbank,* 163 Massachusetts 326, 328. It clearly limits the remedy, as we have shown, in cases where it has nothing to say about the rights. With the explanation that we have made we may repeat here Justice Bradley's words: 'The rule of limited responsibility is now our maritime rule. It is the rule by which, through the Act of Congress, we have announced that we propose to administer justice in maritime cases.'"

On reflection, therefore, when it is remembered that the petition for limitation of liability is merely a form of remedy in Admiralty available to the shipowner in a

proper case, it will be realized that when such a case arises the shipowner should be entitled to avail himself of the remedy, even though it may take away from others the "incident" of trial by jury which they otherwise might have in another forum.

It must be remembered also that seamen are regarded as peculiarly the wards of the admiralty court. There are no decisions in the hundreds of seamen's cases which have come before our admiralty courts in the past which should cause a seaman to fear that in an admiralty court he would suffer any diminution of his rights.

By being brought into a limitation of liability proceeding, a seaman is merely being brought into his proper forum—an admiralty court.

There are, as has been said above, many cases in which the remedies of a seaman under Section 33 of the Merchant Marine Act will not be affected by the shipowner's remedy under the limitation of liability acts.

But in those cases where the seaman's remedy is affected it must give way because a wise public policy to encourage shipping laid down by Congress in the limitation of liability acts, repeatedly approved by this court, and *reiterated in the Merchant Marine Act itself*, demands that the shipowner shall have the remedies given to him by the limitation of liability acts.

If the whole question here involved comes to be regarded as a chancering of public policies, certainly, in the face of the recitals in the Merchant Marine Act, it cannot fairly be contended that the public policy of the

United States is to discourage and embarrass American shipowners, as would be the case if the contention of the appellee in this case should be sustained, and it should be held that Section 33 of the Merchant Marine Act was an implied repeal of the Limitation of Liability Acts in so far as seamen's claims against American shipowners are concerned.

For, as has been above noted, *owing to the venue provisions of §33 only American shipowners properly are affected by the section.*

CONCLUSION.

THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE AND THE SECOND IN THE NEGATIVE.

Respectfully submitted,

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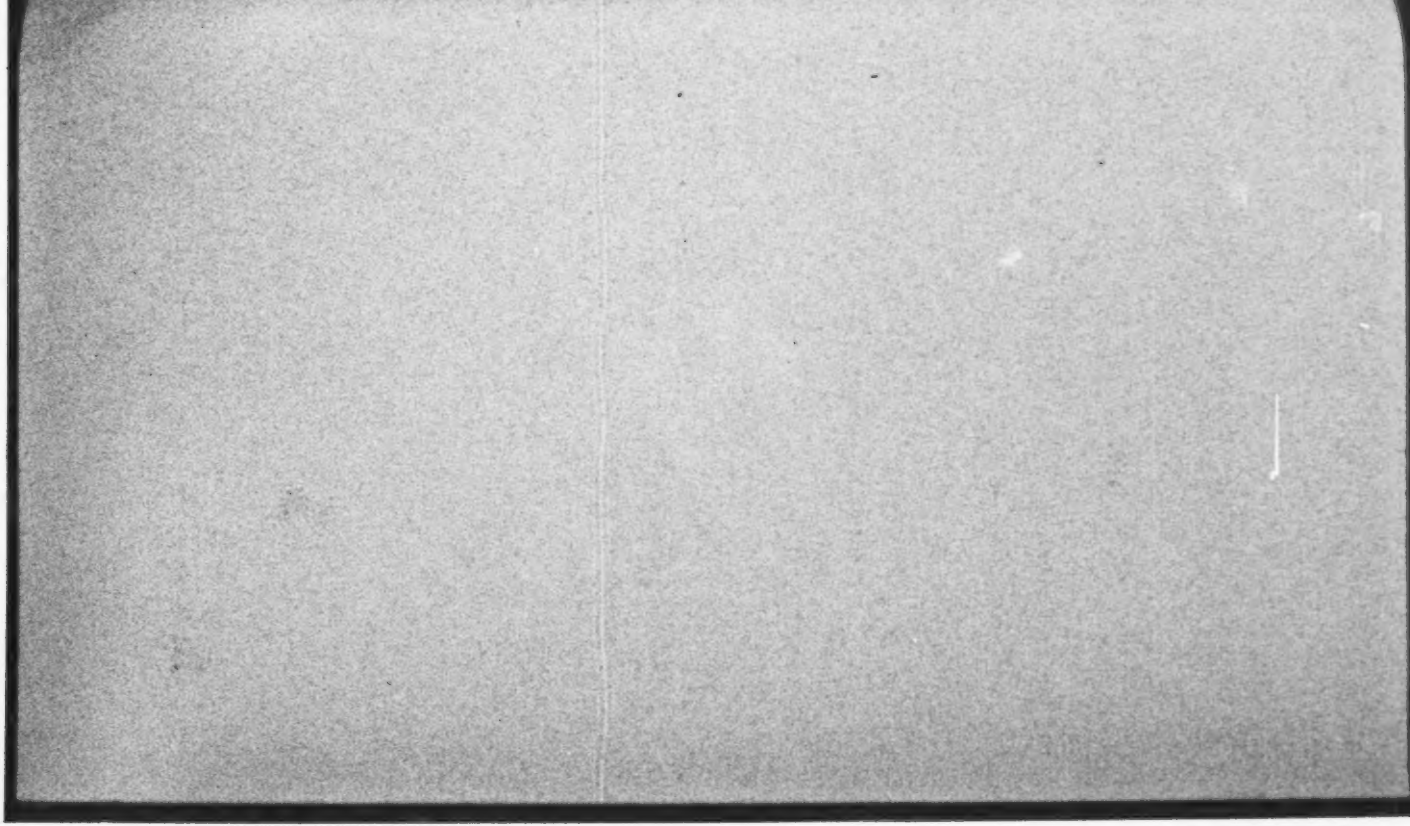
October, 1924.



APPENDIX NO. I.

THE HISTORICAL DEVELOPMENT OF THE DOCTRINE OF LIMITATION OF LIABILITY OF SHIPOWNERS.

APPENDIX NO. 1.

HE HISTORICAL DEVELOPMENT OF THE DOCTRINE OF LIMITATION OF LIABILITY OF SHIPOWNERS.

The words "Maritime Law", as commonly used to-
y, denote that part of the whole law which deals
iefly with the legal situations arising from the use of
ips. But in an earlier period, the Law Maritime had
considerably wider scope. It dealt not merely with
e modern admiralty law, but also with the primitive
cestors of many branches of our modern commercial
w; dealt, too, with the germs of that public law which
today style International Law.

In a large sense the early maritime law might well
ve been called the private (and to some extent the pub-
) international law of its day, a law perhaps not
ternational, but supernational, a visible proof of the
bstantial unity of the great *Res Publica Christiana.*
his feature seems the more striking to us today, but
would probably not have seemed to be at all unusual
the mediaeval student.

Nor, in a still earlier day, would the unity of custom,
e unity of action, the unity of thought, that gave unity
the mediaeval customs on which the mediaeval laws
ere originally based, have been thought any more re-
arkable.

It has been justly observed that the Roman lawyer
uld have had no conception of International Law as
e comprehend its meaning today. Sir Henry Maine has

pointed out that the Roman concept of *Jus Gentium* conveyed ideas quite different to a Roman from those conveyed to, let us say, *Grotius*:

> "Whenever a particular usage was seen to be practiced by a large number of separate races in common, it was set down as part of the *law common to all nations*, or *Jus Gentium* * * *".

The *Jus Gentium* was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes.

It is in this sense of "law common to all nations" that the present subject must be considered, and it is in this sense that England and America have given their adherence to this greater common law. Perhaps, as has been well suggested, the best adjective to apply is "cosmopolitan", but the idea desired to be conveyed will be quite clear.

There is probably no other legal subject whose rules are as uniform and as universal as the Maritime Law. That this should be so is not strange when one considers that the law exists to regulate human conditions, to govern human necessities, and that the conditions and necessities of those who go down to the sea in ships are well nigh universal without respect to race, climate or creed.

Maritime laws are not bound by the form of governments, by the prejudice of castes, by the instinct of races, by the special customs of different nations; they are founded, before everything, on the necessities of mari-

time navigation, for the most part unchangeable. Maritime laws everywhere arise under similar conditions in order to satisfy similar needs, by the very nature of things.

In the Middle Ages the same principles were to be found flourishing throughout Europe in almost every branch of the law, but with the rise of the modern nations this treasured uniformity was almost lost. Almost, but not quite, lost, since the maritime law has, because of its peculiar necessities, preserved its international uniformity until the present day. For this reason, when any fundamental principle of the maritime law is to be considered in any country it is compulsory upon the conscientious inquirer to examine the interpretation of the question at issue as given in the jurisprudence of other countries.

"Uniformity", it has been said in modern days, "is of their essence" (*"L'uniformité est de leur essence," Pardessus,* and also *Desjardins, Droit Commercial Maritime,* p. 2), and as long ago as 1473 the English courts held them to be "the universal law throughout the world". *Y. B. 13, Edw. IV. Pasch. pl. 5—secundum legis natura qu'est appele par ascuns ley Marchant, que est ley universal per tout le monde.*

This is as true of the doctrine limiting the liability of shipowners as of most of the other doctrines of Maritime Law, and this particular doctrine has been universally established since the fourteenth century.

If it cannot be traced back further the reason is not far to seek. In Roman times maritime commerce was

chiefly in the hands of the Imperial Government, and the ensuing Dark Ages were not favorable to the development of legal principles.

But in the fourteenth century there was a great expansion of commerce and trade, and with its growth the law grew concurrently—*Holdsworth, History of English Law,* Vol. V., Ch. 3. It was at this time that the doctrine of limited liability appeared and gained the universal acceptance which it has held for the past six centuries, as will be shown below.

Limitation of liability is not to be found in the Roman Law but the wrongdoer in collision must make full compensation. The owner of a vessel was personally bound for all the acts of the master falling within the range of his authority as master. He was also responsible for the acts of the master, while engaged in the discharge of his functions as master, as well *ex delicto* as *ex contractu.* If there were several owners each was bound individually for the full amount of the obligations of the master arising from contracts. But for obligations arising from tort, each was bound only for his part, that is, in proportion to the interest he had in the ship.

Dig. 4. 9.
Dig. 14. 1. 1.
Dig. 14. 1. 2.
Dig. 14. 1. 5.
Dig. 44. 7. 5.
Dig. 45. 5. 1.
Emerigon, Contracts à la Grosse, c. 4, §11.

This rule of unlimited liability of the Roman Law seems to have been followed by the earlier mediaeval codes, but in the case of inevitable accident it seems to have been modified by the rule of division of loss. In some later codes there are traces of the rule of division of loss being extended to cases of collision by negligence. Swedish Maritime Law, III *Pardessus* 129, 173, 174: Art. 51, Dantzig Sea Laws, IV Bl. Bk. Adm., 349, of the early fifteenth century.

The doctrine of limitation of liability is not to be found in the earlier mediaeval codes nor in any codes which are at an earlier state of legal development. There are certain codes to be found in the north of Europe which have copied the earlier codes of southern Europe, and although these northern codes are later in date they represent an arrested stage of legal development, so that southern codes contemporaneous with these later codes represent a more advanced stage of legal development. Such northern codes are the Wisby Sea Laws, the Gothland Code and the Hamburg Code.

By the earliest codes in use in southern Europe the wrongdoer in the case of collision is generally liable to pay full damages, but the rule of division of loss in collision is apparent from the first. This rule as to the division of loss in case of collision assumes that but for its existence the ship run down would recover all the damages, but it must be said here that the mediaeval rules as to collision are in a very primitive state of development, and nowhere does one meet with the idea of the apportionment of negligence. There is little about collision in the Mediterranean codes.

These earliest codes date approximately from the end of the twelfth century and throughout the thirteenth century. Such codes are the *Rolls of Oleron,* the *Judgments of Damme,* the *Laws of Westcapelle,* the Wisby Sea Laws, the Gothland Code, and the Flanders Sea Laws.

I. Black Book Adm., p. 108.
II. Black Book Adm., pp. 229, 449.
IV. Black Book Adm., pp. 87, 126, 373, 456.

Under the rules of the English Admiral, drawn up between 1337 and 1351, the wrongdoer in a collision is to make full compensation. (*De faire plaine amende,* I Black Book Adm., p. 38).

During the fourteenth century there was a tremendous increase in commerce and in sea travel and in accordance with this, towards the close of the fourteenth century, the maritime law began an important development and newer and more elaborate provisions appeared to take the place of the older and simpler rules which were suited to earlier and more primitive conditions. Public policy, the economic advantage of the state and primitive economic theories appear for the first time and, in a similar and related field, the development of the contract of insurance is conditioned in exactly the same way, at exactly the same period, by public policy and by economic ideas. See *Bensa, Il Contratto di Assicurazione nel Medio Evo,* pages 84 to 86.

Under the newly developing rule ship owners were severally bound for the acts of the master, whether of

tort or contract, but the extent of their liability was limited to the value of the ship. The creditors had always their remedy against the vessel, and through that each owner was liable, but not beyond his share in the vessel.

That this was the settled law of the Mediterranean is abundantly shown in the CONSULATE OF THE SEA, which governed the maritime commerce of southern Europe, and whose final recension appears to date from the close of the fourteenth century.

In *Chapter 194*, it is said that if the master borrows money for the necessities of the ship, in a place where the owners do not reside, the whole ship shall pay the loan, and no part owner can object. But if the ship is lost before the loan is paid, no part owner is bound to pay anything.

In *Chapter 141*, if goods are lost or injured through being laden on deck without the consent of the shipper, and the master has not the means of paying, the ship shall pay. But the owners shall not be liable except for the amount of their shares in the ship. The same principle is again stated in *Chapter 162*, in case of injury to goods by the want of proper apparel or rigging for the vessel.

By the rules in the Consulate, in addition to the direct liability of the master himself, the vessel was tacitly hypothecated for the obligations contracted by him, whether by contract or by tort, but there resulted from them no personal liability to the owners.

"In all damages which are here and shall be mentioned in the chapters of the sea, the master

supports his part of what the ship pays, and each part owner his part, for the ship pays the whole." *Ch. 27. III. Black Book Adm. 102.*

That the legal situation has now changed from primitive times is shown by the fact that one meets with the distinction between torts and contracts.

Torts. The wrongdoer shall pay full damages. (Chapter 155, *E si dan li fa, deulo li tot esmenar a restituir.*) But if the collision is accidental the ship owner shall not be held liable because it is not his fault. (Chapter 155, *no li sia tengut de esmenar tot lo dan . . . per co car no es sa culpa.* Also *Chapter 158*).

Contracts. Owners other than the managing owner are not liable to a merchant for the loss of his goods except to the extent of their shares, unless one can impute to them privity to some fault, as, where the ship's equipment is defective. *Chapters 18, 141, 182, 194.*—III Black Book Admiralty, pp. 93, 245, 344, 381. At this early period one can already see a provision that is to be found incorporated in the statutes in force today. Upon contracts with reference to the ship, entered into by his agent, the liability of the shipowner is limited to the value of the ship. Here as regards contracts we already have at the end of the fourteenth century all the essential provisions of the modern doctrine respecting limitation of liability.

Many origins have been suggested for the doctrine of limited liability, but it seems plain that its origin is mediaeval and to be found in the Mediterranean Sea. *Fremery,* in his *Etudes de Droit Commercial,* c. 27, traces

the origin of this principle to the contract of *commenda*. Such also is the opinion of Marsden, an author whose historical opinions are to be received with the greatest deference.

> "The contract of *commande*, or joint adventure of shipowners and merchants, corresponding in some respect to the *societe en commandite*, or partnership with limited liability, of modern times, is perhaps the origin of the widespread doctrine of limited liability of shipowners. This kind of association extensively prevailed in the Mediterranean in the Middle Ages, and is frequently mentioned in the *Consolato del Mare*." *Marsden, Collisions at Sea*, 8th Edition, pp. 167, 168.

An analogy is also sought to the Roman action of *noxae deditio* which seems to personify any inanimate object by means of which the injury is done and to identify it with the actual wrongdoer.

Bynkershoek, Quaest. Jur. Priv. l. 4. c. 20.

The principle of *deodand* has also been thought to be founded on the same idea and its chief exponent in this country is Mr. Justice Holmes. See his book on the Common Law, page 30. He also cites in the *Liverpool, etc. Navigation Company* case the rule in the time of Edward III—

> "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me." Fitz. Abr., Barre, 290.

It seems probable that in *Liverpool, etc. Navigation Company* v. *Brooklyn Terminal,* 251 U. S. 48 (1919), counsel for the petitioner had this idea in mind in urging that the car float be surrendered because "she was the vessel which actually did the damage" but Justice Holmes held, at page 52, that "the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it."

The James Gray v. *The John Fraser,* 21 How. 184.

The J. P. Donaldson, 167 U. S. 599, 603, 604.

The Eugene F. Moran, 212 U. S. 466, 474, 475.

Union S. S. Co. v. *Owners of the "Aracan",* L. R. 6, P. C. 127.

The rule is not changed by the ownership of the vessels.

The John G. Stevens, 170 U. S. 113, 123.

The W. G. Mason, 142 Fed. Rep. 913, 917. Also 212 U. S. 466, 475 and L. R. 6, P. C. 127, 133.

It seems probable that *deodand* is not the origin of the principle of limited liability, in view of the historically unchallenged opinion that the early medieval law originated on the Continent of Europe and, in all probability, about the Mediterranean. In this opinion Marsden agrees (*Collisions at Sea,* 8th Edition, page 168).

"No trace of it is to be found in the Digest of the Roman Law, nor in the maritime legislation

of the Eastern Empire, nor in the compilation which goes under the name of the 'Rhodian Law', a work which, though not entitled to the name which it has received, is undoubtedly a work of high antiquity, and of an earlier date than any of the maritime codes of western Europe. It originated in the maritime usages of the Middle Ages, and more particularly in the Mediterranean, where commerce first acquired activity and extension after the fall of the Western Empire. In Italy and the southern ports of France and Spain the custom seems to have been nearly coeval with the revival of maritime commerce. That it had its origin in the Mediterranean, and probably in Italy, the cradle of the modern law merchant, appears from the fact that no traces of it are to be found in the Laws of *Oleron*, a code earlier than the Consulate, at least in the form in which we now have it, and which constitutes the basis of the maritime law of the western parts of Europe; nor is there any indication of it in any of the earlier codes which were derived from this primitive compilation." *The Rebecca*, Fed. Case, 11619.

Continental law from the beginning of modern times seems consistently to have considered the principle of limited liability as being inherent by its very nature in the Law Maritime.

The law of Holland has always limited the responsibility of owners, and discharges them from all personal liability, upon their abandoning their interest in the ship to the creditors. *Hugo Grotius* says that the principle of the Roman Law was never enforced there, and he condemns it as both inequitable and injurious to the inter-

ests of trade. As early as 1625 he advocated the limitation of liability upon grounds of public policy in connection with protectionist doctrines. He tells us that the limitation of liability had been applied in his day and long before, in Holland, and he approves of the principle as being agreeable to justice and necessary to encourage shipping. *De Jure Belli ac Pacis,* L. 2, ch. 11, Sec. 13. *"Apud Hollandos ubi mercatura pridem maxime viguit . . . et nunc et olim constitutum ne exercitoria etiam universi (exercitores) amplius teneantur quam ad aestimationem navis, et eorum quae in navi sunt. . . . Absterrentur enim homines ab exercendis navibus si metuant ne ex facto magistri quasi in infinitum teneantur."*

The support of this doctrine by *Grotius* upon grounds of public policy is in complete accord with the principles underlying the entire earlier growth of the maritime law.

The doctrine of *Grotius* applied expressly only to contracts, but Marsden thinks it applied to torts also. *Collisions at Sea,* 8th Edition, page 168.

The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising from contracts as from torts. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for such a distinction. *The Rebecca,* Fed. Case, 11619.

By the statutes of Hamburg (statute of 1603, tit. 18, art. 3) it was established that if the owners chose to abandon the ship, the creditors could demand nothing more

nor touch other property of the owners unless they had specially bound themselves.

The Hanseatic Ordinance of 1644 pronounced the goods of the owner discharged from claims for damages by the sale of the ship to pay them.

The Law of Sweden was equally explicit, and to the same effect as the statutes of Hamburg (Maritime Code of Charles II, 1667, pt. 1, c. 16). According to *Emerigon*, such was the established jurisprudence of the north of Europe. *Contrats à la Grosse*, c. 4, §11.

The definitive modern European rule was established by the promulgation of the famous French *Ordonnance de la Marine* in 1681. This celebrated *ordonnance* was formed upon all the previous maritime codes, ancient and modern, corrected, as is said, by particular information obtained at the time, of the actual maritime jurisprudence of all Europe, and in all questions in this branch of the law it has always been considered as of the highest authority. In such respect was it held on its first appearance, that *Valin*, in the preface to his Commentary, says that it became at once the universal law of maritime nations.

By the provisions of this code the owners of the ship were to be answerable for the acts of the master, but they were to be discharged from their liability by abandonment of their vessel and the freight.

> *"Les proprietaires de navires seront responsable des faits du maitre; mais ils en demeureront déchargé en abandonnant leur batiment et le fret." Liv. 2, tit. 8, art. 3.*

See

Boulay Paty, Cours de Droit Commercial Maritime, 1, 270-6, cited 6 How. 344, 415.

This article was merely an affirmance of the pre-existing law. *Cleirac, Navigation des Rivières,* art. 15, p. 502.

The earlier French law in any case freed the owner from all personal liabilities arising *ex delicto*—

Emerigon, Contrats à la Grosse, c. 4, §11.
Pothier, Des Obligations, No. 452.
Pothier, Contrats Maritimes, No. 51.

—but there was formerly some dispute as to whether it freed the owner from personal liability arising from contracts made by the master. This was set at rest by the broad and sweeping reenactment of the law in 1885, so that today the French shipowner can free himself *even as against the State* from any liability whatsoever to which he was not personally privy.

Boulay Paty, 1, Cours de Droit Commercial Maritime, p. 269.
Code de Commerce Francais, Edition Dalloz, 1924, p. 169, and ib., note 1.

Valin, in his commentary on this passage, after specifying certain engagements of the master which are binding on the owners, without any limit of responsibility, such as contracts for the benefit of the vessel, made during the voyage (except contracts of bottomry), says:

"With these exceptions it is just that the owner should not be bound for the acts of the master,

except to the amount of the ship and freight. Otherwise he would run the risk of being ruined by the bad faith or negligence of his captain, and the apprehension of this would be fatal to the interests of navigation. It is quite sufficient that he be exposed to the loss of his ship and of the freight, to make it his interest, independent of any goods he may have on board, to select a reliable captain."

By the Ordinance of Rotterdam, 1721, the owners shall not be answerable for any act of the master done without their order any further than the value of their share in the ship; by other articles it is provided that each part-owner shall be liable for the value of his own share.

Vinnius states that by the law of the land the owners were not chargeable beyond the value of the ship and the things that were in it. *The Main* v. *Williams,* 152 U. S. 126.

Limiting rules are to be found in almost all of the modern foreign maritime codes.

1. French Code of Commerce, Article 216.
2. German Maritime Code, Article 486.
3. Code of the Netherlands, Article 321.
4. Belgian Code, Articles 46 and 47.
5. Italian Code, Article 491.
6. Imperial Russian Code, Article 649.
7. Spanish Code, Article 587.
8. Portuguese Code, Article 492.
9. Scandinavian Code, Articles 7 and 8.

10. Argentine Code, Article 1039.
11. Brazilian Code, Article 494.
12. Chilean Code, Article 879.

Most of the modern codes follow the French *Ordonnance de la Marine* of 1681 with slight changes of phraseology. Nevertheless, they fall into three lesser subdivisions, namely,

1. The French Rule;
2. The German Rule;
3. The Belgian Rule.

At the outset, it should be recalled that the principle of the legal limitation of liability of the owner seems so much imposed by practical necessities that it is recognized by all the legislation. Monsieur *Ripert*, the author of the *Traite de Droit Maritime*, No. 1228, Vol. 2, 2nd Ed., expresses himself as follows:

> "All the legislations admit that the owner should not be responsible for the act of his maritime representatives to the extent of the whole of his fortune. All the legislations made a distinction and expose his maritime fortune to the suit of the creditors, but safeguard his fortune on land."

Such is the fundamental distinction which is repeatedly found in all the legislations.

The leading provisions, as would be expected, are those of the French Code of Commerce, Article 216. As

originally drawn up, it followed the provisions of the Code of 1681, and read as follows:

> "Every owner of a vessel is civilly liable for the acts of the captain with respect to the ship and the voyage. The liability ceases through the abandonment of the ship and of the freight."

This article, as has been stated, was amended by the law of the 14th of June, 1841, and was finally enacted in its present form by the law of the 12th of August, 1885. It now reads as follows:

> "Every owner of a vessel is civilly liable for the acts of the captain and bound by the obligations contracted by the latter, with respect to that which relates to the ship and the voyage."
>
> "He can, in all cases, divest himself of the above obligations by the abandonment of the ship and the freight."
>
> "In all cases, the option to make an abandonment is not extended to one who is at the same time captain and owner or co-owner of the ship. When the captain is only co-owner, he shall be responsible for the obligations contracted by him for that which relates to the ship and the voyage, only to the proportion of his interest."
>
> "In case of shipwreck of the vessel in a seaport, or harbor, in a maritime port, or in the waters which serve as access thereto, or in case of damage caused by the vessel to the port-works, the owner of the vessel can divest himself, even as against the State, of all the expenses of raising or of repairing, and also of all damage claims, by the abandonment of the vessel and the freight of the merchandises aboard."

> "The same option belongs to the captain who is owner or co-owner of the ship, unless it is proved that the accident was occasioned by his personal fault."

It follows from this text that in theory, the owner, like all principals, is personally liable for the acts of the captain and crew; but, although he who is liable is generally liable to the extent of his whole personal fortune, the owner of a French vessel enjoys the advantage of a limitation of liability. This privilege is exercised by abandoning the physical possession of the ship, and by giving up the freight earned.

The French system of abandonment is adopted and substantially followed by the Commercial Code of the Netherlands, Article 321; by the Italian Commercial Code, Article 491; by the Spanish Commercial Code, Article 587; and by the Portuguese Commercial Code, Article 492. The Codes of Argentina, Brazil and Chile follow those of Spain and Portugal.

The limitation of liability of the shipowner under German Law is provided for by Article 406 of the Commercial Code, according to which:

> "The ship-owner is not bound as to third persons, to the extent of his personal fortune, but only to the extent of the ship and the freight, (1) when the action is founded on an act which the captain has done in that [his] capacity . . . ; (2) when it is founded on the non-performance or defective performance by the captain of a contract entered into by the ship-owner; (3) when it is based on the wrongful act of a person belonging to the crew."

This system arrives at almost the same result as in France, although it rests upon a different theoretical view. In France, as has been shown, it is admitted on principle that the owner is personally liable, but that he has the right to limit his personal liability by invoking the benefit of the option of abandonment.

On the contrary, in Germany, the shipowner is not personally liable, or, more precisely, his liability is purely *in rem*. His maritime holdings alone are obligated, with the result that the shipowner need not make an abandonment. Each ship is the center of a separate maritime holding. The more ships a shipowner possesses, the more maritime holdings he possesses.

Each maritime creditor has a direct right of action against the ship, that is to say, against a maritime holding, but he has no action against the land property of the shipowner.

A conception analogous to that of the German Law is sanctioned by Articles 7 and 8 of the Scandinavian Maritime Code.

The Belgian view is characterized by the fact that it constitutes a sort of juxtaposition of the French view of abandonment in kind, the American view of abandonment of the value of the ship, and the English view of a penal limitation of liability.

The Belgian Law of February 10, 1908, follows very closely the project which was drawn up relative to the liability of the owner of a vessel by the International Maritime Committee at its International Conference at Brussels in 1905.

Articles 46 and 47 of the Belgian Law are drawn up as follows:

Article 46—

"Every owner of a vessel is civilly liable for the acts of the captain and bound by the obligations contracted by the latter in the exercise of his function; he is civilly liable for acts of the crew and his representatives done in the exercise of their respective functions."

"He may, in all cases, free himself from these obligations and the expenses and damages due by reason of assistance or salvage, by the abandonment of the ship and the freight."

Article 47—

"The owner may substitute for the abandonment of the ship, the payment of its value at the end of the voyage or a corresponding sum, for each voyage at (the rate of) two hundred francs per ton of the gross tonnage of his vessel."

"He may not use this latter option to free himself from the expenses and damages due by reason of assistance or salvage."

"The preceding provisions shall not prejudice the right of the creditors to seize the ship, for purposes of conservation, in the course of a voyage, or to demand security."

Thus the owner of a ship is considered as personally liable for the acts and obligations of the captain, and on this point, the Belgian law follows the French system, but the owner who is liable may free himself of his obligation either by (1) the abandonment of the ship and the freight, as in France, (2) the payment of the value of the ship at the end of the voyage, as in America, or (3)

the payment of a penal sum per ton of tonnage, as in England.

The Belgian system has been followed almost literally by Articles 53 to 64 of the Greek Maritime Code of 1910.

Such are the general principles according to which continental maritime legislations have arranged the limited liability of the owner of a ship.

Nevertheless, although the continental rules differ in some particulars as to the means by which a shipowner may free himself from liability, they are all in agreement on the general principle by which the owner cannot be held liable to maritime creditors beyond a limited value corresponding approximately to his maritime investment in the particular ship.

By the common law of England, and by the maritime law as administered in the Court of Admiralty there, the liability of shipowners for damages was unlimited until 1734.

Wilson v. *Dickson*, 2 B. & Ald. 2;
The Dundee, 1 Hagg. 109, 120;
The Aline, 1 W. Rob. 111;
The Mellona, 3 W. Rob. 16, 20;
The Wild Ranger, Lush., 553, 564;
Cope v. *Doherty*, 4 K. & J. 367, 378;
The Volant, 1 W. Rob. 383, 387;
The Scotland, 105 U. S. 24, 28;
The Great Western, 118 U. S. 520, 534;
The Main v. *Williams*, 152 U. S. 122;
La Bourgogne, 210 U. S. 95, 116.
Abbott's Law of Merchant Shipping, 14th Ed., 1045.

In 1734 was passed the Act of 7 George II, c. 15, which limited liability for loss of cargo by the theft and embezzlement of the master or of the crew to the value of the ship and the freight.

The history of the passage of the Act was as follows:

As early as the fifteenth or the beginning of the sixteenth century, a petition asking for an alteration in the law by which shipowners were made liable for damage done by their ships when the owners were not on board, was presented to Parliament. It was not successful. *Ancient Petitions*, 6264.

The situation was brought to a head during the later development of English commerce by the case of *Boucher* v. *Lawson*, *Cas. Temp. Hardw.* 85, 95, English Reports 53, 125. By this case, shipowners were held liable for the loss of a cargo of coin taken on board in Portugal and afterwards stolen by the master.

This decision caused great consternation among the English shipowners.

This is clearly the case referred to in the petition of the shipowners, as set forth in the Journals of the House of Commons, Session of 1733, Page 244, 95 English Reports, Page 55, Note 3. In this petition, the shipowners complained that owners of ships were exposed to no such hazards in other trading nations, and they complained that they did not believe themselves liable to any greater loss than that of the ship and its freight; they requested relief on the ground that otherwise trade and navigation would be greatly discouraged because the shipowners would find themselves exposed to ruin without any fault on their own part.

Parliament appears to have been influenced by this petition and particularly by the fact that laws similar to that asked for were in existence in Holland and in other seafaring countries on the continent. See *per* Lord Stowell, *The Dundee* (1823), 1 Hag. Ad. 109, 121; *per* Abbott, J., *Gale* v. *Laurie* (1826), 5 B. & C. 156, 163; *per* Lord Blackburn, *Stoomvaart &c.* v. *P. & O. St. Nav. Co.*, 7 App. Cas. 795, at 812. See 95 English Reports, p. 55, note 3, further.

There does not appear to have been any considerable discussion in Parliament upon the principle of either this or the subsequent acts limiting the liability of the shipowners, for the merits of the act requested seems to have appeared very obvious. See *Common's Journals*, Vol. 68, Page 670: 133 *Hansard's Parl. Deb.*, Pages 574 and following. Little was said as to principles or policies even in the debates over the Merchant Shipping Act in 1862. *Hansard*, 165 Page 1932: 166, Pages 1217 and following: 167, Pages 735, 750: 168, Pages 1 and following.

By subsequent acts, this limitation of liability was extended to losses in which the master and mariners had no part, to losses by their negligence and to losses by collision—an entire exemption from loss or damage by fire, or loss of gold and jewelry was granted, unless its nature and value was disclosed by the shipper. Act of 26 George III, c. 86 (1786); Act of 53 George III, c. 159 (1813).

The Merchant Shipping Act, 1854, 16 & 17 Vict., c. 131, extended the principle to cases of loss of life and personal injury and provided that in such cases the value of the ship should be taken at eight pounds per ton, ex-

cept in the case of loss of life, where it should be taken at fifteen pounds per ton. This principle has been further extended by the Merchant Shipping Amendment Act, 1862, 25 & 26 Vict., and the principle has been re-enacted and extended by the following Acts:

Merchant Shipping Act, 1894, 57 and 58 Vict. c. 60.
Merchant Shipping Act, 1898, 61 and 62 Vict. c. 14.
Merchant Shipping Act, 1900, 63 and 64 Vict. c. 32.
Merchant Shipping Act, 1906, 6 Edw. VII, c. 48.
Merchant Shipping Act, 1921, 11 and 12 Geo. V, c. 28.

The important provisions of the Merchant Shipping Act are Sections 502, 503 and 504, which read as follows:—

"*Section 502.* The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely;—

(i) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or

(ii) where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.

Section 503.—(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say),

(a) Where any loss of life or personal injury is caused to any person being carried in the ship;

(b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable in damages beyond the following amounts; (that is to say),

(i) in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

(ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(2) For the purposes of this section,—

(a) The tonnage of a steamship shall be her *registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage;* and the tonnage of a sailing ship shall be her registered tonnage: Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto;

(b) Where a foreign ship has been or can be measured according to British law, her tonnage, as ascertained by that measurement shall, for the purpose of this section, be deemed to be her tonnage;

(c) Where a foreign ship has not been and cannot be measured according to British law, the surveyor-general of ships in the United Kingdom, or the chief measuring officer of any British possession abroad, shall, on receiving from or by the direction of the court hearing the case, in which the tonnage of the ship is in question, such evidence concerning the dimensions of the ship as it may be practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of the ship if she had been duly measured according to British law, and the tonnage so stated in that certificate shall, for the purposes of this section, be deemed to be the tonnage of the ship.

(3) The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

Section 504. Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to any competent court, and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just."

Authorities giving the history of the development of the British law on the limitation of a ship owner's liability, at more length, are:

The Volant, 1 W. Rob. 383, 387.
The Carl Johan, 1 Hagg. Adm. 113.
The Dundee, 1 Hagg. Adm. 109, 120, 121.

The Mellona, 3 W. Rob. 16, 20.
Wilson v. *Dickson*, 2 B. & Ald. 2.
The Amalia, 1 Moore P. C. (N. S.) 471, 32 L. J. Ad. 191, B & L. 151.
Chapman v. *Nav. Co.*, 4 P. D. 157.
The Andalusian, 3 P. D. 182, 189.
The Main v. *Williams*, 152 U. S. 122.
Temperley & Moore, 2nd Ed., p. 292.
Maclachlan, 5th Ed., 126.
Abbott's Law of Merchant Shipping, 14th Ed., 637.

The English statutes contain no provision for surrender and assignment of the ship and its freight, but only for paying their value into the court.

The history of the American statute is similar to that of the English act, because it, too, was passed in consequence of a decision affecting adversely the interest of the shipowners.

Before the act of Congress was passed limiting liability, statutes had been passed by the states of Massachusetts and Maine, and both statutes were derived from the original English statute. That of Massachusetts was passed in 1818 and revised in 1836; that of Maine was passed in 1821 and followed the earlier statute of Massachusetts. I Laws of Maine, c. 14, Section 8—by abandoning the ship and its freight, the shipowner was discharged from all personal responsibility. These statutes limit the liability of the shipowner to the amount of his interest in the ship and freight for any embezzlement or damage occasioned by the master or mariners without his privity or knowledge.

In the case of the *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 344, 1848, the owners of the Steamship *Lexington*, which was burnt on Long Island Sound as a result of negligence, couped with defective equipment, were held liable for $18,000 of coin lost in the disaster, in spite of the express stipulation of the carriers with the expressman, (of which the owners of the coin, who contracted only with the expressman, had notice), that they were not in any event to be responsible for loss.

> "In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act". *The Main* v. *Williams*, 152 U. S. 122, 128.

The act of Congress appears to have been passed in the light of the previous legislation in England, in Maine, in Massachusetts, and in France, as far as the Amending Law of 1841, to which reference has been made. *Norwich Company* v. *Wright*, 80 U. S. 104, 119. The purpose of our Limited Liability act was to change the position of, and to confer a benefit on, American shippers and shipowners competing with those of England and other foreign nations.

La Bourgogne, 210 U. S. 95, 120.
Richardson v. *Harmon*, 222 U. S. 96, 103.
Moore v. *American Transportation Company*, 24 How. 1, 39.

Providence & N. Y. S. S. Co. v. *Hill Manufacturing Co.*, 109 U. S. 578, 588.
The Main v. *Williams*, 152 U. S. 122, 128.
Chamberlain v. *Transp. Co.*, 44 N. Y. 305.

By the passage of the Act of 1851, and of the Amending Acts of 1884 and 1886, American law was thereby brought into conformity with the maritime laws of all the other maritime nations. That this principle of limited liability is based upon sound economic theories, and upon universal legal usage, is attested by the experience of every other important country.

> "The general sense of the commercial world seems to be satisfied with holding the owners of vessels responsible to the extent of their interest in the ship, and by abandoning the ship and freight to the creditors, they are discharged. This has for a long period, if I am not mistaken, been the law of all the maritime nations of the continent of Europe" *per* Ware, D. J., in *The Rebecca*, Fed. Cas. 11619, p. 380.

To recapitulate. The purpose of such legislation;—it is imposed by practical necessities which are recognized by the legislation of every maritime country, and these laws are legislative enactments of a common and universal international principle which has been established in the customary law of every continental European country since the fourteenth century, as has been shown above. These necessities were specifically recognized by Parliament and by Congress and by the courts of these two countries.

Mr. Justice Nelson, in *Moore* v. *American Transportation Company*, 24 How. 1, refers to the purpose of the act in the following words, at page 39:

> "The Act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe."

In *Norwich Co.* v. *Wright*, 13 Wall. 104, Mr. Justice Bradley, after explaining the origin of the Limited Liability Act of 1851, deals with the purpose of such legislation in these words (page 121):

> "* * * The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent?"

Again the same learned justice speaks of the Act of 1851 in *The Scotland*, 105 U. S. 24, at page 30, in the following words:

> "* * * This statute declares the rule which the lawmaking power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employés, but risk only the amount of their capital stock in the corporation. The doctrine of *respondeat superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise."

In *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, at page 549, Mr. Justice Bradley gives as the ground of the law of limited liability of shipowners:

> "* * * That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. It extends to liability for every kind of loss, damage and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law. * * *"

And at page 550:

"Various attempts have been made to narrow the objects of the statute, but without avail. It was first contended that it did not apply to collisions. This pretence was disallowed by the decision in *Norwich Company* v. *Wright*, 13 Wall. 104. Next it was insisted that it did not extend to cases of loss by fire. This point was overruled in the case of *Providence & New York Steamship Co.* v. *Hill Man'f'g Co.*, 109 U. S. 578. Now it is contended that it does not extend to personal injuries as well as to injuries to property. If this position can be maintained, the value of the act, as an encouragement to engage in the shipping business, will be very essentially impaired. The carriage of passengers in connection with merchandise is so common on the great highway between the old and new continents at the present day, that a law of limited liability, which should protect shipowners in regard to injuries to goods and not in regard to injuries to passengers, would be of very little service in cases which would call for its application."

Richardson v. *Harmon* seems to be the latest case in which the purpose and effect of these laws is dealt with at any length. In that case, Mr. Justice Lurton makes the following pertinent remarks at pages 103-104:

"• • • The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result

of his own fault, in the instances enumerated, to his share in the ship. * * *"

"* * * In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the Government was to confine the risk of an owner not personally at fault to his interest in the ship."

The legislation of every country, including England and the United States, has given the doctrine of limited liability the widest application and has extended it, as has been shown, to every possible legal relationship of the shipowner, except where he is personally and actually (never constructively) privy.

It is submitted, therefore, that where a principle has been for so long and so universally established in every country of the world as that of limited liability, and where its application has been for so long and so universally admitted to be based upon the fundamental needs of commerce and shipping, Congress would never have ventured to repeal it save in a manner the most definite and the most explicit,—Congress would never have repealed indirectly, by implication and without serious consideration, a law which it itself and the courts of this country, as well as the legislatures and the courts of every other country, have always recognized to be founded upon the most primary and self-evident necessities of sea-borne commerce.

APPENDIX NO. II.

TEXT OF STATUTES RELATING TO LIMITATION OF LIABILITY OF SHIPOWNERS, BEING THE ACT OF MARCH 3, 1851, AS AMENDED AND SUPPLEMENTED BY THE ACTS OF JUNE 26, 1884, AND OF JUNE 19, 1886.

APPENDIX NO. II.

Text of Statutes Relating to Limitation of Liability of Shipowners, Being the Act of March 3, 1851, as Amended and Supplemented by the Acts of June 26, 1884, and of June 19, 1886.

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner (R. S. 4282).

The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending (R. S. 4283).

Whenever any such embezzlement, loss, or destruction, is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her

freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto (R. S. 4284).

It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title (R. S. 4131-4305) relating to his liability for any embezzlement, loss, or destruction of any property, goods or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease (R. S. 4285).

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title (R. S. 4131-4305) relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof (R. S. 4286).

Nothing in the five preceding sections (R. S. 4282-4286) shall be construed to take away or affect the rem-

edy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel (R. S. 4287).

Any person shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars (R. S. 4288).

That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending: *Provided,* That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners (June 26, 1884, ch. 121, sec. 18).

The provisions of the seven preceding sections (R. S. 4282-4288), and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges and lighters (R. S. 4289, June 19, 1886, ch. 421, sec. 4).

APPENDIX NO. III.

RULES OF THE UNITED STATES SUPREME COURT RELATING TO THE LIMITATION OF LIABILITY OF SHIPOWNERS PROMULGATED DEC. 6, 1920. EFFECTIVE MARCH 7, 1921.

APPENDIX No. III.

Rules of the United States Supreme Court Relating to the Limitation of Liability of Shipowners Promulgated Dec. 6, 1920. Effective March 7, 1921.

51. Limitation of Liability—How Claimed.

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" now embodied in sections 4283 to 4285 of the Revised Statutes, as now or hereafter amended or supplemented, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or

owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment thereof into court with interest at the rate of six per cent. per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than thirty days from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.

52. Proof of Claims in Limited Liability Procedure.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court

as the court may determine, subject to the right of any person interested to question or controvert the same; and on the completion of said proofs, the commissioner shall make report, or the court its finding on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

53. Defense to Claims in Limited Liability Procedure.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided he, it or they shall have complied with the requirements of Rule fifty-one and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest

the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied.

54. Courts Have Cognizance of Limited Liability Procedure.

The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf; when the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship shall have already been libeled or sold, the proceeds shall represent the same for the purposes of these rules.

55. APPEALS IN LIMITED LIABILITY CASES.

All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts.

APPENDIX NO. IV.

CHRONOLOGICAL LIST OF CASES IN THE UNITED STATES SUPREME COURT DEALING WITH THE LIMITATION OF LIABILITY OF SHIP-OWNERS.

APPENDIX NO. IV.

CHRONOLOGICAL LIST OF CASES IN THE UNITED STATES SUPREME COURT DEALING WITH THE LIMITATION OF LIABILITY OF SHIP-OWNERS.

APPENDIX NO. IV.

Chronological List of Cases in the United States Supreme Court Dealing with the Limitation of Liability of Shipowners.

Propeller Niagara v. *Cordes*, 21 How. 7 (1858).

Moore v. *American Transportation Company*, 24 How. 1 (1860).

Norwich Company v. *Wright*, 13 Wall. 104 (1874).

The Wanata, 95 U. S. 600 (1877).

Lord v. *Steamship Company*, 102 U. S. 541 (1880).

The Benefactor, 103 U. S. 239 (1880).

The Scotland, 105 U. S. 24 (1881).

Ex Parte Slayton, 105 U. S. 451 (1881).

The Mamie, 105 U. S. 773 (1881).

The North Star, 106 U. S. 17 (1882).

Providence & N. Y. S. S. Co. v. *Hill Manufacturing Co.*, 109 U. S. 578 (1883).

The Mamie, 110 U. S. 742 (1884).

The City of Norwich, 118 U. S. 468 (1885).

The Scotland, 118 U. S. 507 (1886).

The Great Western, 118 U. S. 520 (1886).

Ex Parte Phenix Insurance Co., 118 U. S. 610 (1886).

The Manitoba, 122 U. S. 97 (1887).

Butler v. *Boston Steamship Co.*, 130 U. S. 527 (1889).

In Re Garnett, 141 U. S. 1 (1890).

Craig v. *Continental Ins. Co.*, 141 U. S. 638 (1891).

In Re Engles, 146 U. S. 357 (1892).

In Re Morrison, 147 U. S. 14 (1893).

The Main v. *Williams*, 152 U. S. 122 (1894).

The Chattahoochee, 173 U. S. 540 (1899).

The Albert Dumois, 177 U. S. 240 (1899).

Oregon Navigation Co. v. *Balfour*, 179 U. S. 55 (1901).

The Robert W. Parsons, 191 U. S. 17 (1903).

The Hamilton, 207 U. S. 398 (1907).

La Bourgogne, 210 U. S. 95 (1908).

Richardson v. *Harmon*, 222 U. S. 96 (1911).

The San Pedro, 223 U. S. 365 (1911).

White v. *Island Transportation Co.*, 233 U. S. 346 (1914).

The Titanic, 233 U. S. 718 (1914).

Southern Pacific Co. v. *Jensen*, 244 U. S. 205 (1917).

Clyde Steamship Company v. *Walker*, 244 U. S. 255 (1917).

Pendleton v. *Benner Line*, 246 U. S. 353 (1918).

Luckenbach v. *McCahan Co.*, 248 U. S. 139 (1918).

Capitol Transportation Company v. *Cambria Steel Company*, 249 U. S. 334 (1919).

Liverpool, etc. Company v. *Brooklyn Terminal*, 251 U. S. 48 (1919).

Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255 (1922).

APPENDIX NO. V.

OUTLINE OF STEPS IN A LIMITATION OF LIABILITY CASE.

APPENDIX NO. V.

Outline of Steps in a Limitation of Liability Case.

In the first case that came up to this court after the passage of the Limitation Act, *Norwich Co.* v. *Wright*, 13 Wall. 104 (1871), this court had occasion to discuss the proceeding that had been followed in that particular case and laid down at page 125, at great length, the procedure which should be followed in a proceeding for limitation of liability.

In the opinion it was stated that the court had drawn rules for dealing with these proceedings and those rules were published in 13 Wallace at page XII.

In order that the court may be reminded of the steps which are always had in limitation of liability proceedings, we have ventured to outline the procedure as follows:

1. *The first step is, of course, the filing of a petition.*

The petition sets forth the circumstances of the accident in respect of which limitation is desired, the jurisdictional facts, such as the presence of the vessel or part of her in the district, or the commencement of actions in the district in which the petition is filed.

The prayer of the petition is—

1. That an appraisal should be made of the value of the interest of the owner in the vessel and her pending freight or passage money.

2. That the court will take such steps as may be appropriate for the creation of the limitation fund by way

(*a*) of filing bond, (*b*) sale of vessel by a trustee or (*c*) whatever may be an appropriate remedy in the particular case.

3. That the court may provide for the issuance of a monition requiring all persons to come in and file their claim within a fixed period, usually three months.

4. An injunction shall issue restraining the commencement or prosecution of any proceeding against the petitioner except in the limitation case.

5. Then there is a prayer for judgment *exonerating* the petitioner entirely from any liability in respect of the matters that have happened, or in the alternative, providing that if the petitioner shall be adjudged liable his liability shall be limited to the amount of the fund created or the stipulation filed and the fund shall be distributed *pro rata* among the several claimants who may prove their claims.

II. *The next step in the limitation proceeding is the establishment of the limitation fund.*

This may be done

A. By turning over the vessel to a trustee to be sold and the proceeds paid in the registry of the court.

B. By having an appraisal by competent persons of the vessel and her pending freight and having the amount thereof paid into court, or

C. By having a bond given representing the amount of the appraisal.

Oftentimes, what is known as an *ad interim* stipulation is filed by order of the court in which there is an *ex parte* appraisal of the vessel and the freight, and the court orders a stipulation filed in the amount fixed by such appraisement, with leave to have a reappraisal on motion by any of the interested parties.

III. *When the fund is thus created* and the shipowner has complied with the procedure laid down by the statute and the rules of this court *there is issued an order for monition* providing for the service of a monition or summons on all parties known and the publication thereof for a named period in an appropriate newspaper in order that the world may be advised of the proceeding.

At the same time an injunction issues against the institution of suit in respect of the matters involved elsewhere than in the limitation proceeding. Though customary an injunction is apparently unnecessary under the decision in *The San Pedro,* 223 U. S. 365.

IV. In connection with the monition there is usually appointed *a commissioner* whose duty it is *to receive the claims filed in the proceeding* and assemble them and report the nature and amount thereof to the court.

This is a matter of convenience which enables the court to find out at an early date what claims are brought against the petitioner.

V. *The return day* of the monition is the day on which the *answers* are supposed to be *filed* and the time when further claims become outlawed unless allowed to be filed by special order.

VI. On or before the return day of the monition the petitioner files *exceptions* or *objections to the claims* in which any cross-liabilities claimed on behalf of the petitioner against any particular claimant are set forth.

VII. The next papers to be filed in the case are the *answers by the claimants* who may have come into the proceeding.

These answers may challenge either (a) the question of liability or (b) the question of the owner's privity, or (c) both of these questions.

In many cases the liability only is questioned and the question of privity goes by default in the shipowner's favor.

VIII. The next step, of course, is a hearing on the evidence, at which the court determines whether the shipowner has made out a case freeing him from all liability as, for example, the case of *The Lusitania*, 251 Fed. 715; holding him liable but allowing him to have his limitation, as was the case of *The Old Dominion Steamship Company*, 207 U. S. 398; or holding him liable and disallowing his claim for limitation, as, for example, the case of *The Benjamin Noble*, 249 U. S. 334.

IX. *The appropriate decree* will then be entered either dismissing all claims and exonerating the shipowner or sending the case to the commissioner with instructions to fix the damages, and allocate the recoveries against the fund if limitation is granted, or, if limitation has not been granted by the court, to find the damages and assess them against the shipowner in the amounts found in full. A permanent injunction against all suits is part of the final decree.

APPENDIX NO. VI.

SECTION 33 OF THE MERCHANT MARINE ACT, 1920, IN THE CONGRESSIONAL RECORD.

APPENDIX VI.

Section 33 of the Merchant Marine Act, 1920, in the Congressional Record.

The Congressional Record shows that the Merchant Marine Act originated in the House of Representatives, in a bill consisting of thirteen sections dealing primarily with the Shipping Board and the sale of vessels.

The Senate received the House Bill of thirteen sections. The Senate Committee considered the bill and suggested numerous amendments. The Senate Committee hearings are not reported in the Congressional Record.

The Senate amendment to H. R. 10378 was Amendment No. 139 and offered as Section 36, the identical section which later became law as Section 33, with the exception that the last sentence of Section 33, dealing with jurisdiction, was not included.

Congressional Record, Vol. 59, Part 7, p. 7044.

The amendment to Sec. 20 of the Seamen's Act, i. e. the present Sec. 33 of the Merchant Marine Act 1920, was discussed in the Senate Committee and was reported in the "Hearings before the Committee on Commerce of the United States Senate 66 Congress 2nd session relative to the establishment of an American Merchant Marine" at pp. 1709 and 1712-13.

As follows, at page 1709:

> "Mr. Furuseth.* There is another section to this, the amendment to section. Section 10 of the seamen's act provides that in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority. The Supreme Court in the Chelentis case held that that was meaningless because it had reference to the common law, and the common law had no jurisdiction on board a ship, and so, we will have to, after 15 years of following the common law, in this decision we have got to change all that, and now here is the Supreme Court decision in the case of *Chelentis* v. *The Luckenbach Steamship Co. (Inc.)*."

Then the opinion of this court in the case of *Chelentis* v. *The Luckenbach Steamship Co.*, 247 U. S. 372, was quoted in full.

Then ensued the following discussion at pages 1712-13:

> "The Chairman. What is the amendment you suggest to section 20?
>
> "Mr. Furuseth. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to rail-

* A Norwegian and President of International Seamen's Union of North America. *Senate Hearings on Merchant Marine Act*, page 1625.

way employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.

"Senator Fletcher. In other words, under the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy?

"Mr. Furuseth. He would have no remedy.

"Senator Fletcher. And now you want to change that so he would have a remedy, provided his own negligence did not bring about the injury.

"Mr. Furuseth. That is it exactly.

"Senator Chamberlain. The fellow servant doctrine does not apply to that?

"Senator Nelson. Does that law abolish the fellow servant's rule?

"Senator Chamberlain. It does not exist in admiralty, I think.

"Senator Nelson. And does it abolish the assumption of risk?

"Senator Fletcher. I think it does.

"Senator Nelson. The assumption of risk in the fellow servant's rule goes to the vital rules.

"Senator Fletcher. Yes.

"Mr. Furuseth. With those two, Section 4 and Section 11, it puts it straight if we can get Section 13 and 14 enforced—and there is some hope of it now, I suppose; we have got a new Secretary of Commerce. We have now got some hope of it.

"Senator Nelson. I would suggest to your amendment to Section 20 in line 17 that you transpose the words 'at law' and have them inserted after action, so it would read 'maintain an action at law for damages.'

"Mr. Furuseth. Well, that is all right.

"Senator Nelson. Instead of an action for damages at law.

"Mr. Furuseth. Of course, that is a matter to take care of, that section 20 there to take care of seamen after they are on board of a vessel."

The amended bill of the Senate was sent to the House which refused to accept the Senate amendments. A conference Committee of members of the House and Members of the Senate was appointed and considered the bill.

The bill was reported by the Conference Committee several times and was sent back to conference several times before it was finally passed.

The conference report on the bill was read into the Record. *Volume 59, Part 8, p. 8398.*

At page 8404, the conference report stated that Amendment No. 139 (covering §33 of the Act as finally passed) of the Senate was agreed upon, because the House receded from its disagreement on this amendment when it was allowed to add the sentence as to venue.

There was not any discussion of this amendment Number 139, and the statement of the Conference Committee annexed to the conference report and read into the Record at page 8408, was as follows:

"On Amendment No. 139: This amendment amends Section 20 of the Seamens' Act, so as to

extend the Federal Employers Liability Act to cases of personal injury to or death of seamen. The House recedes with an amendment that jurisdiction of all actions brought under the provisions of Section 20, shall be under the court of the district in which the defendant employer resides, or in which his principal office is located."

On the second submission of the conference report, in Volume 59, Part 8, page 8448, there is no change in this Amendment No. 139, and the same statement regarding it is annexed to the report.

The discussions of the Merchant Marine Act of 1920, in both the House and the Senate, were very extensive and voluminous; but most of the discussion centered around the sale of the vessels and the subsidy and income tax provisions of the bill.

In a rather extensive search, we are unable to discover any discussion of the present Section 33, which section seems to have been added and passed without much consideration.

APPENDIX NO. VII.

RECENT UNREPORTED OPINION BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DEALING WITH THE QUESTIONS CERTIFIED IN THE INSTANT CASE.

APPENDIX NO. VII.

RECENT UNREPORTED OPINION BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DEALING WITH THE QUESTIONS CERTIFIED IN THE INSTANT CASE.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE CHARLES NELSON COMPANY, a Corporation,
Appellant,
vs.
THOMAS S. CURTIS,
Appellee.
No. 4180.

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, THIRD DIVISION.

IN ADMIRALTY: Petition of The Charles Nelson Company for limitation of liability.

FARNHAM P. GRIFFITHS,
JAY T. COOPER,
McCUTCHEN, OLNEY, MANNON & GREENE,
Proctors for Appellant (Petitioner).

HALSEY L. RIXFORD, *Proctor for Appellee.*

Before GILBERT, MORROW, and RUDKIN, Circuit Judges.

MORROW, Circuit Judge:

On August 30, 1922, Thomas S. Curtis, hereinafter referred to as the plaintiff, commenced an action on the law side of the District Court to recover damages from The Charles Nelson Company, the owner of the barkentine *Mary Winkleman*, for personal injuries alleged to have been sustained by him while serving as a seaman on board said vessel.

It was alleged that the injuries were caused solely by the negligence of the defendant, its officers and agents.

The suit was brought under Section 33 of the Merchant Marine Act of June 5, 1920 (41 Stat. 1007). This statute provides: "That any seaman who suffers personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply."

Thereafter, and on February 16, 1923, The Charles Nelson Company, claiming to be the owner of the barkentine *Mary Winkleman*, filed a petition in the District Court for limitation of liability under the Act entitled "An Act to Limit the Liability of Shipowners and for Other Purposes", approved March 3, 1851 (9 Stat. 635, as amended and incorporated in Sections 4283 to 4289 of the Revised Statutes). (Comp. Stats. 8021 to 8023.)

The Charles Nelson Company will hereinafter be referred to as the petitioner.

The Act of 1851 provided in Section 3 of the Act:

> "That the liability of the owner or owners of any ship or vessel * * * for any * * * damage * * * done, occasioned, or incurred without the privity or knowledge of such owner or owners shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

The Act was amended by the Act of June 26, 1884 (23 Stat. 53, 57). In Section 18 of this amendatory Act it was provided:

> "That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his undivided share of the vessel bears to the whole; and the aggregate liability of all the owners of a vessel, on account of the same, shall not exceed the value of such vessel and freight pending. * * *"

The Act was further amended by the Act of June 19, 1886 (24 Stat. 79, 80), so as to extend the provisions of Section 18 of the Act of 1884 to all seagoing vessels.

The petitioner, referring to the accident resulting in the injuries for which plaintiff brings his suit at law, alleges:

> "That on the 5th day of September, 1921, the said barkentine *Mary Winkleman* was lying becalmed in the waters adjacent to the Island of Hawaii; that on said date after about thirty fathoms of chain had been paid out it was discovered that there was a kink in said chain and in order

to free said chain of said kink Paul Raddatz, first mate of said vessel, directed Thomas S. Curtis, who was serving on board said vessel in the capacity of an able-bodied seaman, to go with him to the chain locker in which said chain lay coiled for the purpose of straightening out or freeing said chain of the kink. The said mate Raddatz and the said Curtis thereupon descended to the chain locker located on a platform in the forepart of said vessel and proceeded to remove the kink from said chain. To furnish light for this work, a lighted lantern was taken by the mate. That after the work of freeing said anchor chain had been accomplished and the chain allowed to run free through the hawse pipe, the said Thomas S. Curtis carelessly stepped backward until he stepped off the after end of the said platform upon which the chain locker was located and fell to the bottom of the vessel's hold, which was empty at that time."

Petitioner alleges that any injury suffered by the plaintiff by reason of his falling from the platform into the hold of the vessel was due solely to his fault, and that the petitioner was not in any wise responsible for such injuries. Petitioner alleges further that the amount of plaintiff's claim greatly exceeds the value of the said barkentine, and that the vessel did not carry any cargo on the voyage on which it was proceeding, and that no freight was pending at the time the voyage terminated.

Petitioner alleges further that the injuries to plaintiff, and all damages and injuries, whether of person or property, done, occasioned, and incurred upon the voyage of

the barkentine were done, occasioned, and incurred without the consent or privity or knowledge or design or neglect of the petitioner.

Petitioner prayed for an order of appraisement to be had of the value of the said barkentine at the close of the voyage upon which plaintiff met with his alleged injuries including the amount of freight pending, if any, and that a stipulation or undertaking might be given by the petitioner with sureties conditioned for the payment into court of such appraised values, and that a monition issue against the plaintiff and all other persons claiming damages by reason of injuries to persons or property occurring or arising upon said voyage, citing them and each of them to appear before the court and make due proof of their respective claims at the time to be therein named. The regular procedure provided by Admiralty Rule #51 (adopted December 6, 1920, to take effect March 7, 1921) was thereupon followed. The value of the *Mary Winkleman* was fixed by appraisement at a hearing before a United States Commissioner at $1500. with no freight pending. This appraisement was approved by the court. Subsequently a court order was entered, requiring all claimants to make proof of their claim against petitioner in the proceedings for limitation of liability, and staying all other proceedings against petitioner, and specifically the suit commenced by plaintiff against the petitioner. Thereafter motion was made by plaintiff's proctor, who appeared specially for that purpose, to have the order of the court staying all proceedings in plaintiff's action at law vacated. Upon a hearing this motion was

granted, the court holding that petitioner had no right to have the suit of plaintiff stayed, and that the Limited Liability Act was repealed insofar as it applied to the right of action given a seaman by Section 33 of the Merchant Marine Act of June 5, 1920.

There are no words of positive or express repeal in the section or in the statute of which it is a part.

"It is elementary that repeals by implication are not favored and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes." *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497; *Ex parte United States*, 226 U. S. 420, 424.

The Act in which the section is found is entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes."

The Act provides specifically for the repeal of certain acts relating to emergency shipping legislation passed in 1916, 1917, 1918, and 1919. It also provides regulations for other subjects within the general scope of maritime law and practice.

The evident care exercised by Congress in preparing this Act in all its numerous details of enactments and repeals carries with it the presumption that it provided for the repeal of all statutes that might expressly or impliedly be deemed in conflict with the legislation contained in the Act, and that a statute not so expressly repealed was not deemed to be in conflict with Section 33 of the Act.

In *Panama R. R. Co.* v. *Johnson,* decided April 7, 1924 (advance sheets), the Supreme Court, referring to the course of legislation upon this subject, said:

> "The framers of the Constitution were familiar with that system" the general maritime law, "and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce."

The court, further on, again referring to the course of legislation "as exemplified in Section 9 of the Judiciary Act of 1789, Sections 563 (par. 8) and 711 (par. 3) of the Revised Statutes, and Sections 24 (par. 3) and 256 (par. 3) of the Judicial Code," said it "always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common law remedies through appropriate proceedings *in personam* as a matter of admissible grace."

From this course of legislation the court draws the conclusion.

> "It therefore is reasonable to believe that had Congress intended by this statute to withdraw rights of action founded on the new rules from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose

to make the resort to common-law remedies compulsory, and not merely permissible. But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissible. It says 'may maintain' an action at law 'with the right of trial by jury', the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. * * * So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning."

Furthermore, the new admiralty rules now in force and prescribed by the Supreme Court for regulating the practice in the courts of admiralty of the United States were revised, adopted, and promulgated December 6, 1920, to take effect March 7, 1921. This was more than six months after the passage of the Act of June 5, 1920. The presumption is that the Supreme Court had this act before it and was familiar with its provisions when it adopted Admiralty Rule #51.

That Rule authorizes the procedure followed by the court in this case, including the making of "an order for a monition against all persons claiming damages of said petitioner by reason of injuries to persons or property occurring or arising upon the voyage of said barkentine *Mary Winkleman*," citing them "* * * to appear before the court and make due proof of their respective claims * * *." The court made the further "order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such

claim or claims, including plaintiff's claim. Subsequently this last restraining order of the court was vacated by a second order of the court. The question is, Was the District Court right in vacating its previous order made in pursuance of the Limitation of Liability Act and Revised Admiralty Rule #51, on the ground that Section 33 of the Act of June 5, 1920, had repealed the Limitation of Liability Act and Admiralty Rule #51 as revised?

It was the opinion of the Judge of the District Court that the right of a seaman who has suffered a personal injury in the course of his employment to *elect* to *maintain* an action for damages at law under Section 33 of the Act of June 5, 1920, is absolutely inconsistent with the right of the owner of the vessel to proceed under the Limitation of Liability Act to limit his liability against a judgment under that section to the value of the vessel and the then pending freight; that in sustaining the Limitation of Liability Act in such a case the injured seaman would not have the right of an "election" to "maintain" his action for damages at law with the right of trial by jury. The court was of the further opinion that in using the words "election" and "maintain" Congress must have intended to give the injured seaman a right to recover his damages against the owner in any event, and not to leave him to take his chances with other creditors in the proceeds or value of the ship. The court accordingly held that Section 33 of the Act of June 5, 1920, repealed by implication the provisions of the Limitation of Liability Act so far as the same is inconsistent with the provisions of that section.

A satisfactory construction of the statute standing alone is possibly not without some difficulty, as appears from the opinion of Judge Learned Hand in *The El Mundo*, 294 Fed. 577; the opinion of Judge Garvin in *The Edward*, 294 Fed. 686, and the certificate of questions from the Circuit Judges of the Second Circuit (Judges Rogers, Hough, and Mayer) to the Supreme Court on May 28, 1923, in the case of *The Edward*, 291 Fed. 1017; and the case of *The Scow 84-H*, 296 Fed. 427, in the same court, decided by Rogers, Manton, and Mayer, on December 17, 1923, where, notwithstanding the previous questions certified to the Supreme Court, the Circuit Court of Appeals sustained a petition for the limitation of the liability of the owner of the Scow against an action at law in the state court for damages for personal injury. Finding no negligence on the part of the owner of the Scow, the court, in that case, directed a decree exempting the owner from all liability.

We think, however, a careful consideration of the history of the law upon the subject and its construction by the courts, particularly the recent decision of the Supreme Court in *Panama R. R. Co.* v. *Johnson* (Advance Sheets April 7, 1924; 264 U. S. 375), will give us a satisfactory understanding of the meaning of the section and the purpose of Congress in its enactment.

Section 2 of Article III of the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction".

Proceedings to limit the liability of shipowners are

admiralty cases. *Oregon R'd and Nav'n Co.* v. *Balfour*, 179 U. S. 55.

"The subject (limitation of liability) is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; and if this were not so, the subject-matter itself is one that belongs to the department of maritime law." *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 593.

Section 9 of the Act of September 24, 1789, (1 Stat. 73, 77) provided in Section 9 that the District Courts should "have exclusive original cognizance of all causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it * * * and the trial of issues in fact in the District Court in all cases except civil causes of admiralty and maritime jurisdiction shall be by jury."

"The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors in all cases a common law remedy where the common law is competent to give it, is that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away." Syllabus in *Waring* v. *Clarke*, 46 U. S. (5 How.) 440, 441, 460.

In *Industrial Accident Comm.* v. *Nordenholt Co.*, 259 U. S. 263, 273, the Supreme Court said:

"When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

A seaman who has suffered a personal injury in the course of his employment has always had, therefore, an election since this original judicial act of 1789 to maintain an action at law to recover damages for such injury with the right of trial by jury, the compensatory damages, in admiralty, having relation to the wages of the injured seaman to the end of the voyage and the expense of his maintenance and cure for a reasonable time thereafter. To this right of indemnity has been added by Section 33 of the Act of June 5, 1920, the further right to invoke in such action "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees."

The reference is to the Employers' Liability Act of April 22, 1908, 35 Stat. 65, and its amendments.

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215, 216, the Supreme Court said:

> "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

In *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 382, the Supreme Court said:

> "Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.'"

The court said further:

> "The language of the Section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore. In other words, a seaman could not recover at common law for injuries by negligence on the high seas."

To avoid the objection that no state has the power to change or add to the maritime law, Section 33 of the Act of June 5, 1920, was passed, placing the authority in Congress where the power to add to and amend that law is lodged, that it may be uniform in its operation and prevail throughout the country. *Panama R. R. Co.* v. *Johnson*, supra. That was an action at law under Section 33 to recover damages for personal injuries received by a seaman upon a vessel at sea. The court explains the purpose of the statute as follows:

> "Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

There is no suggestion in that case that the maritime law is in any respect repealed or even modified. We, therefore, return to that law for direction as to procedure.

The case of *The Benefactor*, 103 U. S. 239, was a case of collision off the coast of New Jersey. A limitation of liability was involved. Mr. Justice Bradley, speaking for the Supreme Court, points out with his usual clearness the paramount character of the statute providing

for the limitation of liability of shipowners to the extent and under the circumstances therein stated.

Upon a hearing the District Court adjudged the steamer to be at fault and assessed the damages to libellants and intervenors at $61,810.49. The steamer had previously been appraised and released upon stipulation for the value of $40,000. The court thereupon directed the claimants and their sureties to pay into the registry of the court the amount of the stipulated value of the vessel and for costs,—namely $500. for costs and $40,000. for the appraised value of the steamer, and in default of an appeal the clerk was directed to distribute the proceeds among the libellants in proportion to their recoveries. Nearly two years later the owners of the steamer petitioned the court for limitation of their liability under Section 4283 of the Revised Statutes, alleging that "the loss and damages was without their privity or knowledge." They also petitioned for a final decree that the amount of the stipulated value be distributed pro rata among the claimants, and that upon payment thereof the steamship and the petitioners be forever discharged from further liability, and that an order be made restraining the libellants in the other suits from further prosecuting the same. The District Judge denied the motion for a restraining order, and dismissed the petition for limitation of liability. Upon appeal to the Circuit Court this decree was affirmed. The ground of dismissal relied on by the District Court and adopted by the Circuit Court was that the petition came too late,

inasmuch as it was not filed until after a trial of the cause upon its merits and a final decree thereon.

On appeal to the Supreme Court Mr. Justice Bradley, in his opinion, refers to the ruling of the District Judge, and says:

> "He (the District Judge) supposes that this right to contest the case on the merits at the same time and in the same proceedings that a limited liability is claimed, implies that such proceedings must be instituted before the case has been tried on its merits, because a second trial of the same matter after it has once been adjudicated, will not be deemed to have been contemplated by the rule (56). In supposing that a second trial of the merits between the same parties was not contemplated by the rule, the Judge was correct. But it was certainly not the intention of the Admiralty Rules to preclude a party from claiming the benefit of a limited liability after the trial of the cause of collision."

After explaining the origin of the Admiralty Rule on the subject and the procedure therein provided, the Court said:

> "The amount recovered, whether before the limitation proceedings are commenced or afterwards and whether in the court of first instance or an appellate court, will stand as the recoverer's basis for *pro rata* division when the condemned fund is distributed. In all other respects the proceedings for obtaining a limitation of liability may proceed in ordinary course. * * *"

We come now to the conclusion of the court applicable to the question we have under consideration in this case. The court says:

> "But so far as the petition sought a limitation of the owner's liability to the value of the ship and freight, it was free from objection and ought to have been sustained; and the libellants and intervenors ought to have been restrained by order of the court from collecting or attempting to collect or enforce their respective decrees, whether obtained in that court or in the court of appeal in any other manner than by the *pro rata* distribution of the fund standing by stipulation in place of the ship and freight."

Upon a motion to modify the judgment and mandate, the court, by Mr. Justice Bradley, said further:

> "A question has been made whether, under our decisions in these cases, proceedings ought to be stayed on the decree of the respondents against the steamship *Benefactor*, her claimants and stipulators, until the determination of the proceedings on the petition for limited liability. We have no hesitation in saying that they ought to be so stayed. Our opinion was very clearly expressed, in deciding the limited liability case, that the petitioners were not too late to obtain relief, and that proceedings to collect any decrees rendered against them should be stayed. We held that such decrees would have the effect of res judicata on the question of the liability of the steamship, and as to the amount of damage sustained by the libellants; and that the amount of the decrees would stand as the basis

for determining the pro rata share of the libellants in the common fund to be distributed on the termination of the limited liability proceedings."

In the case of *The San Pedro*, 223 U. S. 365, 371, the Supreme Court held that "The very nature of the proceeding (limitation of liability) is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case."

The right of the shipowner to proceed under the maritime law to limit his liability to the value of the vessel is, therefore, not subordinate to the right of the injured seaman to maintain an action at law to recover damages for his injuries. These rights are independent and in some respects concurrent. But with respect to the final decree, limiting the liability of the shipowner, that law is paramount.

It follows that unless we hold with the court below that Section 33 of the Merchant Marine Act repealed so much of the Limitation of Liability Act as would require the injured seaman to come into the court of admiralty and prove his claim for damages, we must sustain the right of the shipowner to proceed in the limitation of liability proceedings. This is clearly the law as declared in *Panama Railroad Co.* v. *Johnson*, supra.

Appellee has made a motion to dismiss this appeal, or in the alternative transfer the case to the United States Supreme Court. The motion is made on the ground that the order appealed from is not a final decree.

The order vacated a previous order staying plaintiff's action at law against the petitioner. The previous order was made and entered in accordance with the provision of Section 4283 of the Revised Statute, limiting the liability of shipowners, and Rule #51 prescribed by the Supreme Court regulating the practice of courts of admiralty in such proceedings. The vacating order was made upon the ground that Section 33 of the Act of June 5, 1920, repealed by implication the Limitation of Liability Act. This was in effect a final decree in that court upon that question, and practically terminated the proceedings brought by the petitioner to limit its liability under the Act.

As said by the Circuit Court of Appeals of the Fourth Circuit in the case of *The Attualita*, 238 Fed. 909, 910, if this order "remains unreversed, nothing else can be done in the court below which would be worth doing." This would be the situation of the petitioner in this case if the order stands.

The court said further:

> "The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on consideration of the essence of what is done by the decree."

To the same effect is the case of *The Pesaro*, 255 U. S. 216, 217, where it was objected that the decree did not dismiss the libel, and the court said:

> "That it does not formally do so is true, but this is not decisive. The suit is *in rem*—is against

the ship. The decree holds for naught the process under which the ship was arrested, declares she is not subject to any such process and directs her release—in other words, dismisses her without day. Thus the decree ends the suit as effectually as it formally dismissed the libel. Obviously, therefore, it is final."

We are of the opinion that the case is one for our decision.

We are of the further opinion that the order of the District Court dated January 3, 1924, vacating the previous order of the court dated November 3, 1923, staying the plaintiff's action at law against the petitioner, was in effect a final decree, and, being erroneous, must be reversed; the order of November 9, 1923, must be reinstated and further proceedings had in accordance with the Limitation of Liability Act.

ENDORSED: Filed Oct. 27, 1924.

F. D. MONCKTON, Clerk
By Paul P. O'Brien, Deputy Clerk.

FILED
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Supreme Court of the United States

OCTOBER TERM—1924.

No. 81.

In the Matter

of

The Petition of THE EAST RIVER TOWING CO., INC., for Limitation of its Liability as Owner of the Steamtug EDWARD, her engines, etc.

BRIEF FOR APPELLEE ON QUESTIONS CERTIFIED BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WILLIAM S. BUTLER,
JAMES A. GRAY,
HENRY J. BEILMAN,
of Counsel for Petitioner-Appellee.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

INDEX.

	PAGE
Statement	1
Facts	2
Questions Certified	5
Point I	5
Point II	27

CASES CITED.

Providence & N. Y. S. S. Co. v. Hill Manufacturing Co., 199 U. S., 578-590	6
Richardson v. Harmon, 222 U. S., 96	7
Pendleton v. Brenner Line, 246 U. S., 353	7
Liverpool & Gt. Western Steam Co. v. Phenix Ins. Co., 129 U. S., 397	7
Sect. 6, Chap. 149, 35 Stat. L., 65	8
Metropolitan Redwood Co. v. Dor, 223 U. S., 365	9, 22
Martin v. N. Y. R. R. Co., 241 Fed., 696	10
Teel v. Chesapeake R. Co., 204 Fed., 918	10
Hulac v. Chicago R. Co., 194 Fed., 747	10
Sec. 5, Employers' Liability Act	13
Sec. 6, Employers' Liability Act	13
Panama R. R. Co. v. Johnson, 264 U. S., 375	14
Paquete Habana, 175 U. S., 677	16
U. S. v. Yuganovich, 246 U. S., 448	16
Campbell v. Wadsworth, 248 U. S., 169	16
Mary Winkleman, 294 Fed., 926	19
Judge Partridge's Opinion	19
Benefactor, 103 U. S., 239	24
Sandberg v. McDonald, 248 U. S., 185-201	26
The Kensington, 183 U. S., 263	26

Supreme Court of the United States

In the Matter

of

The Petition of the EAST RIVER TOWING CO., INC., for limitation of its liability as owner of the steam tug "Edward," her engines, etc.

On a Certificate from the U. S. Circuit Court of Appeals of the Second Circuit.

BRIEF OF APPELLEE.

Statement.

The questions of law concerning which the Circuit Court of Appeals desires the instruction of this court involve a construction of Section 33 of the Merchant Marine Act of June 5th, 1920 in its relation to and effect upon the limited liability of ship owners in actions arising and being prosecuted under its provisions.

The decision of the District Court is reported below as The Edward, 294 Fed., 686.

The certificate is reported below as The Edward, 291 Fed., 1017.

Facts.

The decree of the United States District Court, Eastern District of New York, resulting in the certificate herein, vacated a stay of an action pending and ready for trial in the Supreme Court, of the State of New York, County of Kings, brought by the personal representative of Thomas McCaffrey, who died August 2nd, 1922, as a result of personal injuries received by the explosion of the boiler of the steam tug "Edward" of which he was captain.

The action was brought and was being prosecuted under Section 33 of the Merchant Marine Act of June 5th, 1920.

The action was commenced by the service of a summons and complaint on the defendant on or about the 2nd day of October, 1922, and issue was joined by the service of defendant's answer on or about October 18, 1922.

Thereafter a motion for preference was made by the plaintiff, the said motion was granted and said action set for trial as a preferred cause on December 11, 1922.

Thereafter and on or about December 5, 1922, the defendant procured from the United States District Court, Eastern District of New York, and served upon the plaintiff's attorney in the above mentioned action, an order restraining the further prosecution of the action aforesaid, that is, the action wherein Elizabeth McCaffrey as administratrix of Thomas McCaffrey, deceased, is plaintiff, and The East River Towing Co., Inc., is defendant, then pending in the Supreme Court of the State of New York for the County of Kings, and the institution and prosecution of any action of any nature or description whatsoever, except in

that proceeding, against the defendant in that action, in support of any claim arising out of or connected with the accident which occurred on August 2nd, 1922, wherein the steamtug "Edward" was sunk by an explosion in the East River off the foot of Gold Street, Brooklyn. Subsequently the usual monition, requiring the personal representative of said deceased seaman to appear in the said United States District Court on or before the time therein stated, to make due proof of her claim before a commissioner therein appointed to take such proofs, was served upon the attorney for the personal representative in said pending action. A motion was thereupon made in the District Court to vacate and set aside the said stay.

In support of the motion to vacate it was shown that the said action of Elizabeth McCaffrey, as administratrix, etc., of Thomas McCaffrey, deceased, was pending in the Supreme Court of the State of New York, in an action by the legal representative of a seaman for damages sustained by the next of kin of said seaman for the death of said seaman as a result of personal injury received in the course of his employment.

It was also shown that prior to the accident the defendant in said action and the petitioner herein had procured for the benefit of itself and for its employes insurance against loss and/or expenses arising or resulting from claims upon the insured for damages in consequence of any accident occurring to said employes while in the course of their employment not to exceed $25,000 in case of one person being injured, and not to exceed $100,000 for all persons injured in the same accident, and the said contract of insurance was in force at the time of the accident resulting in the death of plain-

tiff's intestate. The policy of insurance was informally produced in court and used upon the argument.

The appearance of the personal representative in this proceeding was made specially and her motion based upon the following specific grounds:

> "1st. The Act of 1851 and amendments thereto commonly known as the Limited Liability Law and the Rules in Admiralty adopted in pursuance thereof have no application to the cause of action set forth in the complaint of the plaintiff therein.
>
> 2nd. This court has no jurisdiction to restrain or in any way interfere with the prosecution of said action begun and pending in the Supreme Court of the State of New York for the cause of action set forth in the complaint therein.
>
> 3rd. That the petitioner herein is indemnified to the extent of $25,000 against loss by accident such as that set forth in the complaint in the said action and under the terms of the said policy of indemnity the insurance carrier is not released by the bankruptcy or insolvency of the assured and the liability therefor, in any event, is that of the insurance carrier and not of the petitioner herein."

The motion to vacate such stay was granted and a decree to that effect entered. Subsequently, by motion, the decree was resettled and from such resettled decree an appeal was taken to the Circuit Court of Appeals for the 2nd Circuit which court under the provisions of Section 239 of the Judicial Code asks instructions from this court.

QUESTIONS CERTIFIED.

(1) If an action at law be brought such as is described in Merchant Marine Act 1920, Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?

(2) Has the Merchant Marine Act 1920, Sec. 33, impliedly repealed the statute regarding limition of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned?

In this brief they will be considered in their reverse order.

POINT I.

The limited liability acts have no application to cases brought under the Jones Act for personal injury resulting in death.

Appellee in the court below did not and does not now raise any question with respect to the validity of the Limited Liability Act or with the exclusive jurisdiction of admiralty in any case when such Limited Liability Act is applicable.

She did not then and does not now question the right of the District Court to restrain or stay the prosecution of and remove to itself any action where limited liability is applicable.

Neither did she contest nor dispute the right of petitioner herein to claim the benefit of said act in the pending proceeding for itself, as against damages to persons or property other than seamen in the course of their employment.

The whole scheme of Limited Liability is embodied in the Acts of Congress of 1851-1884 and 1886. In these Acts, however, the scheme is but sketched in outline and the regulation of details as to the form and modes of procedure was left to be prescribed by judicial authority. As was said by Mr. Justice Bradley in Providence and N. Y. S. S. Co. v. Hill Manufacturing Co., 199 U. S., 578-590:

> "It (the Act) laid down a few general principles and propositions and left it to the courts to enforce them and carry them into practical effect."

It was in pursuance of this judicial duty that the Rules in Admiralty regulating and prescribing the proceedings necessary to be taken to procure the benefit of limited liability were formulated.

It follows therefore that the policy of limited liability under the restrictive clauses contained in each of the Acts, such restrictions becoming a part and parcel of the policy, is that of Congress.

It also follows that if Congress has changed by addition or qualification the policy adopted three quarters of a century ago the judicial authority to enforce, by proper regulation, such changes, additions or qualifications may still be invoked and exercised.

Without burdening the court with citation or quotation it may be asserted that the history of the limited liability legislation and its judicial construction from its inception shows its purpose to have been to encourage the building of ships and the erection of a merchant marine that would comport with the dignity and importance of the Nation in the world of trade.

But also running through the policy of the law, at least since 1884, has been the protection of seamen and a safeguarding of their rights such as the exemption of seaman's wages and, from its inception, the exclusion, from the benefits of limitation, loss incurred with the privity and knowledge of the owner.

The limitations and qualifications particularly applicable to the pending proceeding, as appellee contends, are summarized in Richardson v. Harmon, 222 U. S., 96, and reiterated in Pendleton v. Brenner Line, 246 U. S., 353, and are such as leave the owner only "liable for his own fault, neglect and contracts."

The same thought is expressed in Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S., 397, where Mr. Justice Gray in commenting on a contract by a carrier not to be answerable for its own or its servants' negligence in reference to such carriage and repudiating it as being contrary to public policy said:

> "The only important modification by the Congress of the United States of the previously existing law on this subject is the Act of 1851 to limit the liability of ship owners (Act, March 3, 1851 & 43; 9 Stat. at L., 635 R. S., Sects. 4282-4289) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew."

It will not of course, be disputed that prior to the enactment of Sec. 33 of the Merchant Marine Act of June 5, 1920, except for unseaworthiness, a seaman injured in the course of his employment

could recover only for maintenance wages and cure; if death ensued no right of action at all existed under the Admiralty Law in favor of his legal representatives.

The effect, however, of the above named act was to change all that and in plain language, to place seamen upon the same footing as railroad employees engaged in interstate commerce, both as to personal injuries and death as the result of such injuries. Now a seaman who suffers personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury and all statutes modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such case *all statutes* of the United States *conferring or regulating* the right of action for death in case of railway employees shall be applicable.

The instant case arises by reason of the death of a seaman and hence under that section a "case in which *all statutes* of the United States *conferring or regulating* the right of action for death in case of railway employees" applies.

Section 6, Chap. 149, 35 Stat. L. 65, 18 Fed. Stat. An., 2nd Ed., 1369, one of the statutes of the United States "regulating the right of action" for death in case of railway employees provides:

> "Sec. 6. * * * The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under

this act and brought in any State Court of competent jurisdiction shall be removed to any Court of the United States."

That the proceeding inaugurated by the appellant, when it filed the petition herein seeking to limit its liability under the Act of 1851, constituted a *removal of the action* from the Supreme Court, a state court, to the Admiralty Court, a federal court, cannot be denied.

> "The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered and a stipulation entered into to pay the value into court, *requires every person to assert his claim in that case.*
>
> * * * * * * *
>
> In that situation, the jurisdiction of the court (the Court of Admiralty) to hear and determine *every claim in that proceeding became exclusive.* It was then the duty of every other court, federal or state, to stop all further proceedings in separate suits upon claims *to which the Limited Liability Act applies.*" (These italics are ours.)
>
> *Mt. Redwood Co.* v. *Dor,* 223 U. S., 365.

The state court is ousted of all jurisdiction, and the remedy sought therein must be pursued in the proceeding in the Admiralty Court.

Appellee's right to damages and the amount of damages, if any, to which she is entitled must be fixed and determined by a commissioner named by the Admiralty Court instead of, as Congress says,

"an action for damages at law with the right of trial by jury."

The power of the court to thus abrogate a valid and constitutional provision of the statute law of the land is respectfully challenged.

It has been held in the Southern District of New York (*Martin* v. *N. Y. R. Co.*, 241 Fed., 696), in numerous other district courts and the Circuit Court of Appeals of the Sixth Circuit (*Teel* v. *Chesapeake R. Co.*, 204 Fed., 918), that the section under discussion prevents the removal from a state to a federal court on *any ground whatever.*

The opinion of the court in *Hulac* v. *Chicago R. Co.*, 194 Fed., 747, is most enlightening on the reasons moving Congress to enact the Employers' Liability Act and the Safety Appliances Act, and every word of the learned court in that opinion is persuasive as to the reason for extending all statutes of the United States conferring or regulating the right of action for death in the case of railroad employes to actions for the death of seamen as the result of injuries received in the course of their employment.

One paragraph in the opinion is so *apropos* to the special point under consideration that it deserves segregation and the special attention of the court in that connection called to it. It is:

> **"One of the rights which Congress had in mind was the right of the servant to choose the forum in which his action should be litigated."**

Other excerpts from the opinion:

> "The prohibitory clause was added as an amendment in the Senate of the United States

and accepted with very little debate. It is not conceivable that Congress did not understand the full import of the words of the amendment and that no exception was expressed. That Congress did intend to forbid the removal of cases arising under the Employers' Liability Act, upon any ground, appears from the fact that the same Congress, at the following session, again forbade the removal of cases in Section 28 of the Judicial Code, and this was by an amendment immediately following the re-enactment and codification of the law covering the whole subject of the right of removal.

It is a well-recognized fact in judicial history that plaintiffs, in actions brought by employes against railway companies resulting from personal injuries, have quite generally and for many years sought to bring and retain their actions in the state courts, and the fact is well attested by the multitude of applications to remand such cases which have been constantly presented to the federal courts. The expense of trials and appeals in the federal courts have been deterrents, and the variance in the rules of law in such cases as applied in the state and federal courts has been well understood. Congress has recognized by the Employers' Liability Act, as well as by the Safety Appliance Acts, that these rules of law should be made more favorable to the injured servant. The purpose of Congress in the enactment of the Employers' Liability Act was the granting of additional rights to the servant and the removal of existing defenses by the master in actions by injured employes against railway companies. One of the rights which Congress had in mind was the right of the

> servant *to choose the forum* in which his action should be litigated. The amendatory Act of Congress gives concurrent jurisdiction to the courts of the United States, and increases the number of districts in which the plaintiff may sue in the United States courts and while thus enlarging the rights of the plaintiff, and in harmony with the general scope of the act, cuts down the rights of the railway company by forbidding a removal of the case upon any ground."

This and the preceding cases were decided and placed in the reports long before Congress provided by the Jones Act that

> "in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, *and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable.*"

It is hardly conceivable that Congress was ignorant of Section 6 of the Employers' Liability Act or of the construction that had been put on it by the courts throughout the Union. They did not except from the statute the application of this section to cases of seamen and the inevitable conclusion is it was intended to apply.

It is argued that the repealing clause of Merchant Marine Act says nothing of limited liability, while if Congress intended to affect that provision it would have referred to it specifically. Why, when the system brought into the admiralty law

contains a prohibition of limited liability should further reference be necessary.

Sec. 5 of the Federal Employers' Liability Act, provides:

> "Sec. 5. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void * * *."

Paraphrased in accordance with the provisions of the Merchant Marine Act this section would read:

> "Sec. 5. That any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any ship owner to exempt itself from any liability created by this Act shall to that extent be void * * *."

Of course, the primary object of this provision was to prevent an employer from contracting with the employee or establishing any rule or regulation himself, which would have the effect of limiting his liability.

But it declares an established policy, to wit: that full indemnity shall be paid for the injury sustained, by all who come within its provisions and prohibits any device whatsoever the purpose or intent of which is to exempt the employer from liability and is in accord with the public policy referred to in Great Western Steam Co. v. Phoenix Insurance Co., supra.

Certainly the Congress never intended to, itself, allow to remain as applicable and controlling a limitation of liability which it prohibited the

parties themselves to create by agreement. Such inconsistency should not be attributed to our highest and most respected law making body. Especially is this true when the effect would be to practically nullify the removal of a distinction between employees differing only in the place of employment, the existence of which distinction has been, for many years, abhorrent to the moral sense and conscience of the country and to humanity and to render nugatory a remedial act which must always be given such construction as will best tend to "prevent the mischief and advance the remedy."

This court has recently had before it in the case of Panama Railroad Co. v. Johnson, 264 U. S., 375, construing Sec. 33 of the Merchants' Marine Act and in a lucid and convincing opinion sustained the power of Congress to enact it.

In the course of the opinion this very suggestive language occurs:

> "Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded *by the maritime law as modified* and not between that and some non-maritime system." (Italics ours.)

In other words Congress, exercising the power it has always possessed, but has never before used, has brought into the maritime law and made part and

parcel of that system rules which since 1908 have been applicable to railroad employees under Federal jurisdiction.

That these rules are an innovation no one will deny, but their incorporation into the maritime law is no greater innovation nor a more radical change in the existing order than was their original incorporation in the system from which they are taken.

The action of Congress in making these rules a part of the maritime law is merely symbolic of the age in which we live, an additional evidence of advancement in civilization, a recognition by the law making power that the seaman is no longer the slave to whom even the doors of the courts are closed but possesses rights and privileges which he may assert and to which heed must be given.

It is suggested and earnestly urged that repeals by implication are not favored. Counsel is not prepared, nor is it found necessary, to combat this suggestion. Appellee was absolved from any such claim by the learned District Judge who said in his opinion granting the motion to vacate (294 Fed., 686):

> "No question is raised with respect to the validity of the Limited Liability Act, or with the exclusive jurisdiction of Admiralty in any case when such limited liability is involved; but it is contended that the enactment by Congress of the Jones Act, so called (41 Stat. 988), was intended to afford seamen rights which had theretofore been denied."

The ground of the motion to vacate the stay specifically set forth appellee's claim to be that the

Limited Liability Act of 1851 and the amendments thereto and the rules of admiralty adopted in pursuance thereof had no application to the cause of action set forth in the complaint to wit, damages for the death of a seaman as the result of personal injuries sustained in the course of his employment and such is still the view it is desired to urge.

While it is well established that repeals by implication are not favored it is equally well established that, in so far as a subsequent statute is inconsistent with or repugnant to an existing one or the new statute covers the entire field to which it relates or changes a legislative policy theretofore established or qualifies existing law, the subsequent statute will prevail. The Paquete Habana, 175 U.S., 677, and cases cited;

> U. S. v. Yuganovich, 246 U. S., 448;
> Campbell v. Wadsworth, 248 U. S., 169.

A somewhat analogous situation arose in connection with the construction of the Act of 1884 (23 Stat. L., pp. 53, 57), a statute adding to the existing Limited Liability Act.

In the course of the discussion of the effect of this enactment in Richardson v. Harmon, 222 U. S., 96, 103, this court said:

> "No purpose to repeal or qualify any of the terms of the existing liability law is declared, nor is this section declared, in words, to be an amendment of that law. But neither fact is of any marked importance. If the necessary effect be to repeal any part of the former law because of repugnance, that consequence must be declared. So, too, if it be in effect an amendment of the law as it stood, by extending that

law to cases not before within it that effect must be given to it without any unnecessary disturbance of the qualifications or procedure under the former law.

The legislation is in pari materia with the Act of 1851 (9 Stat., L. 635, Chap. 43, Sec. 3), as carried into the Revised Statutes as Secs. 4283 et seq. (U. S. Comp. Statutes, 1901, p. 2943) and must be read in connection with that law; and so read should be given such an effect, not incongruous with that law, so far as consistent with the terms of later legislation. * * * The avowed purpose of the original act was to encourage American investments in ships. * * * The same public policy is declared to be the motive of the Act of which this section is a part."

If the effect of Sec. 33 of the Merchants' Marine Act, also declared to be motivated by the "same public policy" after the changed conditions brought about by the lapse of seventy five years, is to change the law as it stood by *withdrawing* from its operations cases theretofore within its provision "that effect must be given to it, without any unnecessary disturbance of the qualifications or procedure under the former law" as it applies to cases not affected by the new legislation or by a later public policy.

This court in the last case cited (Richardson v. Harmon, supra), in effect, held that the first question in any specific case to be determined was whether the case was one "in respect to which his liability is limited," and that is the question which has been decided adversely to appellant here.

Since 1851 much water has gone over the dam. *Tempora mutantur et nos mutamur in illis.*

The age of the Leviathan has succeeded that of the packet on the sea.

Manpower in all fields of endeavor is no longer a commodity to be traded upon in the marts of the world.

In no particular has our progressive civilization been more marked than in the advanced legislation of the last two or three decades for the betterment of those who labor under conditions which they can not control but must depend upon those in authority to make the surroundings reasonably safe for their protection.

On shore this has been demonstrated by the numerous State Employers' Liability Acts, State Compensation Laws, Labor Laws and in the Second Federal Employees' Liability Act. For the benefit of seamen and in a manner approved by this court, the latter system by virtue of the enactment now under consideration was imported into and made a part of the maritime system (Panama R. R. Co. v. Johnson, *supra*).

If the restriction contended for by the appellant attaches, the sytem is in effect nullified and the great step forward rendered worthless to those intended to be benefited thereby.

On sea as on land the maintenance of the efficiency and morale of the operative is of prime importance.

Bennedict in Bennedict's Admiralty, Fourth Edition at page 149, Section 190, states the proposition as follows:

> "'Ships were originally invented for use, and profit, to plough the seas, not to lie by the walls.' The ship being finished and furnished, her first want is a ship's company to navigate

her. Without their strength, and knowledge, and skill, and intrepidity, she must rot at the wharf, or be hurried to destruction. The ship, that by the agency of the most uncertain, capricious, and powerful elements, moves with a certainty and a security only surpassed by the beauty of her appearance and the grace of her motion, when under the control of a well appointed crew, becomes, in the hands of unpractised landsmen, the victim of the first peril, and their efforts only urge her the sooner to inevitable destruction. The service of the ship's company is, therefore, the maritime service which is entitled to the highest consideration and the greatest favor * * *."

This is also well stated by Judge Partridge in the case of the "Mary Winkleman," 294 Fed., 926, who, after speaking of the benefits to be derived by encouraging persons to engage in the building of ships and navigation, says:

"These considerations must appeal with the utmost cogency to anyone who realizes the extent to which our future depends upon the development of our merchant marine. But, on the other hand, it may pertinently be asked 'What's the ship without the men?' Is it too much to hope, that it will be possible to build up a body of vigorous, rugged, intelligent seamen, in such numbers that American ships can at all times confidently rely upon the best of American crews. Is it not apparent that the very existence of such a corps will be the very highest stimulus to the production and maintenance of American bottoms? But how can we expect such a corps, if the American sailor

"is in a position materially more disadvantageous than that of other American workmen? It is no answer, either, to say that there are already many such; for the very reason that their condition has been greatly ameliorated by humane legislation; but for the additional reason that the numbers of such men should be vastly greater than they are.

"It has become a truism that seamen are the wards of Admiralty—to be jealously guarded from oppression or wrong. This is all right enough; but it does not, and should not, accord with the dignity of a noble profession—in that the American seaman who is to maintain and enlarge our prestige on the sea should not and must not, have any need of wardship. His status should be and must be, defined with precision, so that his calling will be invested with the dignity which it deserves. To that end has pointed the whole trend of modern legislation; and it seems to me that the courts should have it constantly in mind, so as to further and not retard, all progress toward that end.

"Nor is it difficult to find recognition of this in the course and history of legislation with regard to seamen, as well as the general trend of judicial interpretation. If it has lagged behind legislation looking to the betterment of the condition of other American workmen, it is only because it has had a greater way to go, and a heavier load to carry. In fact, the distance between the condition of the seaman of half a century ago and his status today is far greater than the progress which has been made with regard to other workmen—not because the progress has been further forward, but because it started much further back.

"Section 33 of the Merchant Marine Act of 1920 reads as follows:

'Section 33. That section 20 of such act of March 4, 1915, be and is, amended to read as follows: Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply,' etc.

"There are no words here of positive or express repeal of the Limited Liability statutes. But the rule that repeals by implication are not favored, has no application where a right or remedy is created inconsistent with a previous statute. Under the law as it stood at the time of the enactment of Section 33, if an action was brought by an injured seaman, he could not 'maintain' it, if the owner of the vessel saw fit to proceed to limit his liability. By the very provisions of the Admiralty rule, the court must issue an order forbidding him to maintain it. What, then, is the result of a statute giving him the right to 'maintain' an action at common law? Maintain, in this sense, means 'to continue or persevere in or with; to carry on'—Webster's International Dictionary. But clearly, he could not 'persevere with' or 'carry on' his action if he could be stopped by limitation proceedings. Moreover, the statute gives him an 'election.' The limitation of liability statute, on the other hand, gives the election to the owner. The

"effect of Section 33, therefore, is to create a new right absolutely inconsistent with the owner's right to elect to surrender his vessel, and thus limit his liability to her value and earned freight. Otherwise it is this *reductio ad absurdum*: The sailor may 'elect' to maintain his action at law, unless the owner 'elects' to surrender his ship.

"The same result is obtained by approaching the problem from the opposite direction.

1. Limited liability proceedings are of such a character that they merge in themselves all suits and claims. As was said in Metropolitan Redwood Co. v. Dor, 223 U. S., 365; 'The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case.

2. The limitation of liability proceeding, is, of course, strictly in admiralty.

3. The effect of the proceeding, before the enactment of Section 33, was to compel everyone, including an injured sailor to come into that proceeding in admiralty, and there assert his claim.

4. The effect would be that the injured seaman would not have an 'election' to 'maintain' his claim before a jury.

5. It seems to follow inevitably that Congress, in using the words 'election' and 'maintain' must have intended to give the injured seaman a right to recover his damages against the owner in any event, and not to leave him

"to take his chances with other creditors in the proceeds or value of the ship.

"Nor is there anything novel or unusual in a statute which gives a preference of this kind to those who work for wages. It has its basis in the logic of necessity, and the humane recognition of the fact that quite generally the workman's wages, or indemnity in the event of his injury or death by accident, are necessary to the support of his family. For example, most, if not all of the states exempt at least a portion of his wages from execution for other debts than those incurred for necessities. In the event of the bankruptcy of the employer, or an assignment for the benefit of creditors, a preference is given to the wages of employees. The same preference prevails as to the seaman's wages in Admiralty. Workmen's Compensation Laws have proved so beneficent, both to employer and employee, that scarcely a voice, any more, is raised against them. Illustrations might be multiplied indefinitely. But these are enough to suggest that Congress must have intended, in accordance with the whole trend of modern economic and sociological legislation, to put the case of an injured seaman in a different category from other claims."

We are of course not unaware that the learned Circuit Court of Appeals of the 9th Circuit did not agree with the conclusion reached by Judge Partridge in the "Mary Winkleman" (The Charles Nelson Company v. Curtis, decided Oct. 27th, 1924 and not yet reported) but Judge Partridge's opinion is so apropos to the line of thought we have tried to express that it is incorporated as a part of this memorandum.

Should we be permitted to comment upon the conclusion reached by the Circuit Court of Appeals and the reasons given therefor we must hark back to 1880, years before even a seaman's wages had been exempted from the operation of the Limited Liability Law and consider the Benefactor, 103 U. S., 239.

If the learned Circuit Court had followed Judge Bradley's argument it would have found the outstanding theory of the decision to be that the flexibility of admiralty proceedings is such as to enable courts to so shape their course as to obtain justice between the parties and extends the right to limit the liability after the damages have been assessed by the trial court.

It also decided *in that case* the right to stay, by order, the collection of the decree in any other manner than by the pro rata distribution of the fund standing by stipulation in place of the ship and freight.

It is not an authority either to stay the prosecution of the action now pending or for the proposition that the limited liability act is applicable under the circumstances of the instant case.

At the very outset of this memorandum we said:

> "She did not then and does not now question the right of the District Court to restrain or stay the prosecution of and remove to itself any action *where limited liability is applicable.*"

We do not combat, in the slightest, any conclusion reached by the revered judge who wrote for the court in the Benefactor, supra, but commend to this court the suggestion of the flexibility of admiralty proceedings enabling courts to so shape

their course as to obtain justice between the parties, for such is all we ask and as little as we expect of this court in the instant case.

In this flexibility of proceedings lies the answer to the major part of the brief of appellant.

He enumerates the cases in which the limited liability act has been held to apply and says:

> "These various parties * * * must come into a limitation proceeding to assert their claims although quite obviously they would have no concern with any of the provisions of the Merchant Marine Act."

Of course they have no concern in the Merchant Marine Act and hence they are in no way affected by it but remain just where the Limited Liability Act places them.

On the other hand the representative of the seaman whose death resulted from personal injuries sustained in the course of his employment is vastly concerned.

His action is brought upon a cause of action unknown to the maritime law until almost three quarters of a century after the Limited Liability Act was passed.

The section of the Merchant Marine Act which created this cause of action attached no limitation or qualification to it but made it specifically applicable to seamen only and to them only when death ensued from injury sustained in the course of employment.

Under the Limited Liability Act, as we have seen, the ship owner while liable, without limit for his own negligence, is liable only to the extent of the ship and freight for the negligence or misconduct of the master and crew or as differently expressed "for his own fault, neglect and contracts."

Under the system imported into the maritime law and which appellee invokes, he is liable, without limit, not only for his own negligence, but for the negligence of those to whom he delegates the duties imposed by law upon himself, that is to say: for death resulting in whole or in part from the negligence of any of the officers, agents or employees of the ship-owner or by reason of any defect or insufficiency due to his negligence in the ship's appliances or machinery.

In case of death, "election" is not a part of the provision. The right to "maintain" the action is not subjected to any limitation or qualification whatever.

In concluding this memorandum an excerpt from the dissenting opinion of Mr. Justice McKenna in Sandberg v. McDonald, 248 U. S., 185-201, written many years before the enactment of Section 33 of the Merchant Marine Act, June 5, 1920, is quoted:

> "This section and the others we have quoted express something more than particular relations of ship and seaman,—they express the policy of the United States, which no private conventions, no matter where their locality of execution, can be adduced to contravene. The Kensington, 183 U. S., 263, citing cases. Nor are we called upon to assign the genesis of the policy or trace the evolution of its remedy to the act in controversy; and besides, it has been done elsewhere. It is enough to say that the act itself demonstrates that it is intended as a means in the development of the merchant marine and it hardly needs to be added, to quote counsel for the government, 'that the welfare of the seaman is remarkably interrelated with that of the merchant marine.'"

In view, therefore, of these many incongruities between the old law and the new, of the evident intention of the Congress to keep pace, in Maritime matters, with the trend of the times by bringing into the maritime law rules from a tried and approved system in another and closely allied industry and thus establishing a rule of liability of the ship owner to the seaman which did not exist when the Limited Liability Act was passed, as well as the avowed purpose of both acts to be the betterment of the Merchant Marine, it seems clear that the second question should be answered in the affirmative, modified if necessary, to accord with the qualifications and limitations placed upon the Limited Liability Law by the Merchant Marine Act 1920, Section 33.

POINT II.

The first question should be answered in the negative.

The Federal Judicial Code, Sec. 265, prohibits an injunction to the state court except in bankruptcy cases.

More by common consent than by direct legislation or judicial determination an exception to that rule has been accorded proceedings to limit liability. Whether this is justified it is not necessary to discuss or to determine. If the second question is answered in the affirmative, it follows, as a matter of course, that the first must be answered in the negative.

Respectfully submitted,

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CONTENTS

I

PAGE

SECTION 33 OF THE MERCHANT MARINE ACT OF 1920 HAS NOT REPEALED THE STATUTES REGARDING LIMITATION OF LIABILITY OF SHIPOWNERS SO FAR AS CLAIMS OR SUITS BASED ON PERSONAL INJURIES TO, OR DEATH OF SEAMEN ARE CONCERNED..... 1

The respective statutes..... 2, 3

Rules governing a repeal by implication..... 4

The field of operation of the Limited Liability Acts..... 5

The object and purpose of section 33..... 10

The interrelation of the two groups of statutes.... 13

There is no repeal..... 19

II

THE PROSECUTION OF AN ACTION AT LAW BROUGHT UNDER SECTION 33 CAN BE ENJOINED BY THE INJUNCTION IN LIMITATION PROCEEDINGS AS PROVIDED FOR IN ADMIRALTY RULE 51..... 20

If there is no repeal, the Limited Liability Acts are paramount, and regular limitation proceedings ensue..... 20

CASES CITED

PAGE

Butler *v.* Boston Steamship Co., 130 U. S. 527.....5, 9, 14, 18, 21
Carlisle Packing Co. *v.* Sandanger, 259 U. S. 255.. 11
Re Charles Nelson Co., 294 Fed. 926..... 3, 17
Chelentis *v.* Luckenbach SS. Co., 247 U. S. 372.... 4, 11
The *Edward,* 294 Fed. 686..... 3
The *84-H,* 296 Fed. 427..... 21
El Mundo, 294 Fed. 577..... 3
Erie Railroad Co. *v.* Hansen, 260 Fed. 100..... 16
The *Hoffmans,* 171 Fed. 455..... 19
Loughlin *v.* McCaulley, 186 Pa. 517..... 19
The *Osceola,* 189 U. S. 158..... 11
Panama Railroad Co. *v.* Johnson, 264 U. S. 375.. 11, 12
The *Passaic,* 204 Fed. 266..... 15, 17
Providence & New York S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578..... 21, 22
Richardson *v.* Harmon, 222 U. S. 96.....9, 17, 20, 21
Re St. Louis & Tennessee River Packet Co., 266 Fed. 919 18
The San Pedro, 223 U. S. 365..... 21
The *Scotland,* 105 U. S. 24.....7, 10, 15
Tennessee Coal Co. *v.* George, 233 U. S. 354..... 12
The *Titanic,* 233 U. S. 718..... 9, 14
The *Transfer No. 12,* 221 Fed. 409..... 19

Limited Liability Law, Acts of March 3, 1851 (R. S. 4283), June 26, 1884 (23 Stat. 57) and June 19, 1886 (24 Stat. 79, 80)..... 2, 3
Merchant Marine Act, June 5, 1920, Section 33... 2
Endlich, Interpretation of Statutes..... 4

SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF the Petition of THE EAST RIVER TOWING CO., INC., for Limitation of its Liability as owner of the steamtug EDWARD, her engines, etc.	October Term 1924 No. 81

BRIEF SUBMITTED AS AMICI CURIÆ IN SUPPORT OF THE PETITION

SECTION 33 OF THE MERCHANT MARINE ACT OF 1920 HAS NOT REPEALED THE STATUTES REGARDING LIMITATION OF LIABILITY OF SHIPOWNERS SO FAR AS CLAIMS OR SUITS BASED ON PERSONAL INJURIES TO OR DEATH OF SEAMEN ARE CONCERNED; AND THE PROSECUTION OF AN ACTION AT LAW BROUGHT UNDER THAT SECTION CAN BE ENJOINED BY THE INJUNCTION IN LIMITATION PROCEEDINGS AS PROVIDED FOR IN ADMIRALTY RULE 51.

I

The real question presented by the certificate is whether Section 33 has impliedly repealed the earlier federal statutes relating to shipowners' liability; for, if there is no repeal, an action at law under that section is

subject to the broad regulatory provisions of Rule 51, and an injunction, if the proceedings are proper, must issue.

Section 33 of the Act (Merchant Marine Act, June 5, 1920), is as follows:

"Section 33: That Section 20 of such Act of March 4th, 1915, be, and is, amended to read as follows:

"Section 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The pertinent statutes bearing on the limitation of vessel owners' liability are found in 6 Fed. Stat. Ann. (2nd ed.) 336 (R. S. 4283), and 6 Fed. Stat. Ann. (2nd ed.) 368 (23 Stat. 57). The first statute was the Act of March 3, 1851, and the second, section 18 of the Act of June 26, 1884. They are as follows:

"Section 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned or incurred, without the privity, or knowledge of such owner or owners,

shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

* * * * * *

"Sec. 18. That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners."

The provisions of Section 18 of the Act of 1884 were extended to all seagoing vessels by the Act of June 19, 1886 (24 Stat. 79, 80).

The basis for the argument that Section 33 impliedly repeals the earlier statutes is the clause "may at his election maintain an action for damages at law, with the right of trial by jury" and it is contended that the inclusion of this clause in the statute affects a sweeping change in the maritime policy of this country. (Opinions of District Judges in this case, 294 Fed. 686; *El Mundo*, 294 Fed. 577, and *Re Charles Nelson Co.*, 294 Fed. 926.)*

There is no doubt that Congress could work such a change if it so desired, and the question is whether it has done so by this statute. That there is no express repeal of the earlier Limited Liability statutes is not questioned. Section 33 is part of the Merchant Marine

* When this brief was going into print, the decision of the Circuit Court of Appeals for the Ninth Circuit reversing *Re Charles Nelson Co.*, 294 Fed. 926, was announced. A copy of the Court's opinion is printed as Appendix VII to the brief of the appellant petitioner.

Act of 1920. Section 2 of that Act repeals certain statutes; no mention is made of the Limited Liability statutes. *But Section 1 declares that the purpose of the Act is to stimulate private ownership by citizens of the United States in a merchant marine and to develop and encourage the maintenance of such a merchant marine.* Moreover, section 33 itself is an amendment of Section 20 of the Act of March 4, 1915, dealing with the rights of seamen in cases of injury and which was before the court in *Chelentis* v. *Luckenbach Steamship Company,* 247 U. S. 372.

The rules governing a repeal by implication are fully stated in *Endlich, Interpretation of Statutes,* § 210, as follows:

"But repeal by implication is not favoured. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is a rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject" (pp. 280, 281).

Unless, therefore, the provisions relating to the limitation of ship owners' liability are utterly inconsistent with and in direct conflict with Section 33, the two acts must remain and effect will be given to each as the occasion requires. Whether or not the two groups of statutes are inconsistent and conflicting will be determined by the respective sphere of influence of these statutes and by their history and purpose.

The purpose of the Limited Liability Acts and the policy that dictated their enactment have often been declared by the court.

Butler v. *Boston Steamship Co.*, 130 U. S. 527, involved the questions whether the Limited Liability Acts applied to personal injuries and death as well as to cases of loss of or injury to property and whether those statutes had not themselves been superseded by the Steamboat Inspection Act of February 28, 1871. The court, in holding that the statutes did apply to injury and death cases, said:

"If we look at the ground of the law of limited responsibility of ship-owners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise. That ground is, that for the encouragement of ship-building and the employment of ships in commerce, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge. *It extends to liability for every kind of loss, damage and injury.* This is the language of the maritime law, and it is the language of our statute which virtually adopts that law. The statute declares that 'the liability of the owner of any vessel, for embezzlement, loss or destruction, by any person of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for

any act, matter or thing, [loss], damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner, or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.' (Rev. Stat. 4283. The word 'loss' in the statute of 1851 is printed 'lost' in the Revised Statutes, evidently by mistake.) This is the fundamental section of the law. On this section the whole provision turns. And nothing can be more general or broad than its terms. The *'liability* * * * shall in no case exceed', etc. It is the liability not only for loss of goods, but for any injury by collision, or for any act, matter, loss, damage or forfeiture whatever, done or incurred" (pp. 549, 550) (italics ours).

* * * * * *

"Now it is contended that it does not extend to personal injuries as well as to injuries to property. If this position can be maintained the value of the act, as an encouragement to engage in the shipping business, will be very essentially impaired. The carriage of passengers in connection with merchandise is so common on the great highway between the old and new continents at the present day, that a law of limited liability, which should protect ship-owners in regard to injuries to goods and not in regard to injuries to passengers would be of very little service in cases which would call for its application" (p. 550).

* * * * * *

"We have no hesitation in saying that the limitation of liability to the value of the ship and freight is general; and that when the proceeds of the latter are insufficient to pay the entire loss, the object of the fourth section of the old law (the 4284th of the Revised Statutes) is mainly to prescribe a *pro rata* distribution amongst the parties who have sustained loss or damage. We think that the law of limited liability applies to cases of personal injury and death as well as to cases of loss of or injury to property" (p. 552).

* * * * * * *

"The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a

part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law" (p. 555).

With respect to the contention that in cases of personal injury and death the Limited Liability statutes were superseded by the Steamboat Inspection Act, the court said:

"It is contended, however, that the act of February 28, 1871, entitled 'An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes,' 16 Stat. 440, supersedes or displaces the proceeding for limited liability in cases arising under its provisions. We do not see the necessity of drawing any such conclusion. The act itself contains no provision of the kind. It requires certain precautions to be taken by owners of coasting steam-vessels and those engaged in navigating them to avoid as far as possible danger to the lives of passengers. Amongst other things, by the 51st section of the act (Rev. Stat. § 4401), it is provided that all coast-wise seagoing steam vessels 'shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.' By the 43d section (Rev. Stat. § 4493) it is declared that whenever damage is sustained by a passenger or his baggage, the master and owner, or either of them, and the vessel, shall be liable to the full amount of damage if it happens through any neglect or failure to comply with the provisions of the act, or through known defects, etc. This is only declaring in the particular case, what is true in all, that if the injury or loss occurs through the fault of the owner, he will be personally liable, and cannot have the benefit of limited liability. But it does not alter the course of proceeding if the claim of limited liability is set up by the owner (p. 553).

In *The Scotland*, 105 U. S. 24, the court, in holding that the owner of a foreign vessel could obtain the

benefit of the Limited Liability Acts in our courts, said:

"The act of Congress creating a limited responsibility of ship-owners in certain cases, first passed March 3, 1851 and reproduced in sects. 4282-4289 of the Revised Statutes, is general in its terms, extending to all owners of vessels without distinction or discrimination. It declares that 'the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of value of the interest of such owner in such vessel, and her freight then pending.' This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employes, but risk only the amount of their capital stock in the corporation. The doctrine of *respondeat superior*, it is true, applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, 'Men would be deterred from owning and operating ships, if they were subject to the fear of an indefinite liability for the acts of the master.' Jure B. & P., lib. 2, c. 11, s. 13.

'*But it is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases.* We see no reason, in the absence of any different law governing the case, why it should not be applied to foreign ships as well as to our own, whenever

the parties choose to resort to our courts for redress. Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor" (pp. 30, 31) (italics ours.)

The principle that the law of limited responsibility "extends to liability for every kind of loss, damage and injury" (*Butler* v. *Boston Steamship Co., supra*) was further emphasized in *Richardson* v. *Harmon*, 222 U. S. 96. In construing the act of 1884 and extending it to a non-maritime tort, damage to a bridge by a vessel, the court said:

"In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the Government was to confine the risk of an owner not personally at fault to his interest in the ship. To say that Congress meant no more by extending the limitation to any and all debts and liabilities than to include obligations arising *ex contractu* would be to utterly ignore the fact that such a construction would leave an owner subject to a large class of obligations arising from non-maritime torts, and leave nothing to which the words, 'any and all * * * liabilities' could apply" (p. 104).

Moreover the statutes were not intended to be set up in hostility to other statutes, state or federal, which might create new rights or liabilities. They created no new rights, in the sense of new claims to be enforced at the behest of the person asking relief for a wrong done him; and they operate on the rights of others, whether those rights are based on statute or not, only to the extent of requiring that the amount recovered, which might otherwise be unlimited, be limited by a measure fixed by our maritime policy. *The Titanic*, 233 U. S. 718.

There can be no doubt that the purpose of Congress in passing the Limited Liability Acts, was to bring our maritime law with respect to ship-owners' liability into harmony with the law of the Continent, so that American shipping interests would not be at a disadvantage in competition with foreign shipping interests. The statutes were enacted so that American capital might be attracted to shipping without exposing itself to undue risks, and in recognition, so far as single ships were concerned, of the value of the social policy permitting the limitation of risk of an industry when carried on under corporate form. The statutes have remained on the books, unimpaired, over seventy years and should be regarded as the fundamental law of the land in maritime matters,—the law under which "we propose to administer justice in maritime cases" (per Bradley, *J.*, in *The Scotland, supra*). Statutes of such long standing, and so fundamental in their operation should not lightly be set aside, nor should they be regarded as repealed and rendered obsolete by any subsequent legislation short of an actual declared repeal.

The purpose and object of Section 33 can be seen by the state of the law which preceded it. Up to the time of its passage a seaman who was injured could recover "maintenance and cure", and indemnity only in case his injuries resulted from the unseaworthiness of the vessel. That was the measure of his rights and the extent of the ship-owners' liability whether suit was brought at law, in a state court or federal court, or in admiralty. If the action was brought at law the seaman could have a trial by jury under the "saving clauses"

of the various Judiciary Acts from the Act of 1789 on (Judiciary Act of 1911, sec. 24, subd. 3 and sec. 256, subd. 3).

Panama Railroad Co. v. *Johnson,* 264 U. S. 375;
Carlisle Packing Co. v. *Sandanger,* 259 U. S. 255;
Chelentis v. *Luckenbach S. S. Co.* (*supra*);
The Osceola, 189 U. S. 158.

As a seaman always had his choice of a forum and as he could always "maintain an action for damages at law with a right of trial by jury" this clause in section 33 conferred no additional rights upon him (*Panama Railroad Co.* v. *Johnson, supra*). The section did, of course, create broad substantive rights by conferring upon seamen the benefit of the Federal Employers' Liability Act originally enacted for the benefit of railroad employes. But, until the decisions of the district judges in this case and the other two cited (p. 3, *brief*) it had always been the law that a seaman's right to recover for injuries was subordinate to the ship-owners' right to limit his liability (*Carlisle Packing Co.* v. *Sandanger, supra*). If therefore, it should be held that Section 33 impliedly repeals the Limited Liability Acts because of the provision for a jury trial the court would be giving sweeping effect to a clause which in any event is superfluous.

Indeed a most effective answer to the suggestion that there has been an implied repeal is the fact that when Congress desired to exempt a seaman's claim for wages from the operation of the limited liability statutes it said so in express terms (see the proviso in the statute of 1884, p. 3, *brief*). If Congress cared to free

a seaman who had been injured from the limitation imposed on the amount of recovery by the limitation statutes, it would have been equally astute to do so by express provisions and it cannot be said to have done so by the clause as to a jury trial.

The opinions of the District Judges in the cases below were written before the decision of the court in *Panama Railroad Company* v. *Johnson, supra,* and it is at least questionable whether the judges would have decided as they did, if they had had the benefit of the court's views in that case. For the clause as to a jury trial upon which they based their opinions is no longer to be regarded as an absolute direction as to the court in which suits under the statute are to be litigated and must be construed as codifying ancient principles with regard to the forum of a seaman's action for injuries. A seaman could always "at his election" sue at law or in admiralty and Section 33 merely reaffirms that election; and wherever he sues, his suit is on a maritime cause of action, and always subject to the principles of our maritime jurisprudence. (*Panama Railroad Co.* v. *Johnson, supra,* p. 388.) The section is not like one "where the provision for the liability is coupled with a provision for a special remedy and that remedy, and that alone, must be employed" (*Tennessee Coal Co.* v. *George,* 233 U. S. 354, 359), and it "neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so" (*Panama Railroad Co.* v. *Johnson, supra* (p. 388).

Since the section does not change the nature of a seaman's cause of action and since it leaves unchanged the

appropriate forum of litigation, the basis of the District Judges' refusal to enforce the Limited Liability statutes falls. It would not be contended that if a seaman were to bring suit in admiralty under the new rules, his rights under those rules would be absolute and unlimited by the limited liability statutes. Can it be supposed that the intention of Congress was to subordinate the ship-owners' right to limit his liability to the rights of a seaman under this statute if an action were brought at law? If that were true, the very objection to the statute suggested in the *Johnson* case [that it was limited in operation to actions at law and so brought lack of harmony into the maritime law] would still be open to argument. But, to paraphrase the language of the court in that case "such a distinction would be so unreasonable that we are willing to attribute to Congress the purpose to make it" (p. 391). Or, suppose a case where there are claims by passengers, members of crew, cargo-owners and others, and the ship-owner petitions for limitation before suits are started by claimants. There is no doubt that the claim of an injured seaman in the limitation proceedings, like the claims of all others, would be subject to the operation of the limited liability statutes. If a seaman should start an action at law a day before the limitation proceedings were commenced, should not the claim be similarly subject?

If the clause as to a jury trial is disregarded, as we believe it should, it is submitted that no points of conflict remain. The two statutes occupy different positions in the field of legislation and each can be operative within

its own field. The Limited Liability Acts underlie all discussion of our maritime law. They are the foundation of our maritime law and all other statutes of special or limited application are built upon them. As pointed out in *The Titanic* (*supra*), they created no liability but assumed its existence from other sources. "That [the Act of Congress limiting liability] does not impose but only limits the liability—a liability assumed already to exist on other grounds" (p. 733). They in no way conflict with statutes which have as their purpose the creation of new rights or the imposition of liability. So in *Butler* v. *Boston S.S. Co.* (*supra*), where the court was called upon to apply the Massachusetts Death Statute in limitation proceedings, it said:

"We have no hesitation, therefore, in saying that the limited liability act applies to the present case, notwithstanding the disaster happened within the technical limits of a County of Massachusetts, and notwithstanding the liability itself may have arisen from a state law" (p. 558).

Section 33 creates certain additional rights. Apart from the reaffirmation of a seaman's privilege of having his case tried before a jury, if he is in a court of law, he is given the benefit of certain statutes originally passed for the benefit of railroad employes. He is no longer confined to a recovery for "maintenance and cure" and he no longer need prove unseaworthiness in order to establish liability. If, however, as has always been the case heretofore in a seaman's action for injuries, circumstances which bring his case along with other cases into a court of admiralty and into limitation proceedings supervene, his new rights, never absolute, must yield to the older and more general principle of our maritime

law as embodied in the Limited Liability Acts—the principle that assuming the existence of liability the extent of that liability will be measured by the ship-owner's interest in the venture.

The section changes common law notions of *respondeat superior* by making the ship-owner liable to a seaman for the negligence of a fellow-seaman; but it does not change the cause of action nor enlarge the *quantum* of damages. Mr. Justice Bradley in *The Scotland* (*supra*) suggested the analogy between the limited liability of shareholders in a corporation and the limitation of liability of a shipowner in a particular venture (p. 30). It is true, he said, that the doctrine of *respondeat superior* applies to the corporations themselves; but that does not interfere with the personal immunity of the shareholders. Similarly the doctrine of *respondeat superior* has been changed by Section 33, to the extent of making the ship-owner liable in cases where he heretofore has not been liable; but that does not interfere with his personal immunity beyond the extent of his interest in the particular venture.

The uniform practice of courts below, state and federal, in cases that have come before them, where an apparent conflict between the Limited Liability Acts and other statutes or sources of law has presented itself, has been to enforce the Limited Liability statutes as the basis of the extent of liability.

In *The Passaic,* 204 Fed. 266, the Circuit Court of Appeals for the Second Circuit had before it what we consider to be the very question as in this case and it decided that the Limited Liability Acts were paramount and in no way affected or modified by the provisions of the second Federal Employers' Liability Act. An action had been brought against the Erie Railroad

Company under the Federal Employers' Liability Act in the New York Supreme Court to recover damages for the death of plaintiff's intestate, an oiler on a ferry-boat. The Railroad Company filed a petition in admiralty to limit its liability, at the same time denying its negligence. The case was disposed of on its merits favorably to the petitioner in the district court and on appeal the decree was affirmed. It was urged by the claimant that the Federal Employers' Liability Act of 1908 by implication repealed the earlier limited liability statutes so far as the Act of 1908 dealt with employes of railroad companies engaged in interstate commerce on navigable waters. The court held that there was no repeal.

"If the limited liability act and the acts regulating the liability of such railroads to their employes can be construed consistently with each other, so that both shall stand, they must be so construed. What shocks the mind is that whereas full compensation can be had in the case of employes of such a railroad company killed or injured on shore, often only a partial compensation or none at all can be had in the case of employes killed or injured on a vessel of the railroad company. Still this is the very distinction which Congress has made and for many years permitted to stand between liability of defendants generally for the loss or injury to persons or property on shore and liability of vessel owners for the same injuries. *The acts of Congress regulating the liability of railroads to their employes does not affect the cause of action in any way, but abolish certain defenses, such as contributory negligence and assumption of risk. This is entirely consistent with previous legislation limiting the extent of the employer's liability for the cause of action*" (pp. 267-268) (italics ours).

To the same effect is the ruling of the District Court in *Erie R. R. Co.* v. *Hansen,* reversed on other grounds in 260 Fed. 100.

The Federal Employers' Liability Act does not expressly confer a right of trial by jury. Section 3, however, provides that in a case of contributory negligence,

"the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe";

and inasmuch as the statute deals with a subject matter within the jurisdiction of common law courts, the right to a jury under that Act is certainly as broad as the right of trial by jury which it was contended was conferred on seamen by Section 33. The latter act purports to confer on seamen substantially the same rights that railroad employes have under the Federal Employers' Liability Act; and if the holdings of the court in *The Passaic* and *Hansen* cases are sound, we submit that the same procedure should be followed with respect to the present claim.*

A similar question was before the court in *Richardson* v. *Harmon* (*supra*). The case arose out of a collision between a steam barge and a railway drawbridge resulting in damage to both barge and bridge. The owners of the bridge brought an action in the State Court of Ohio to recover their damage. Thereafter the owners of the barge filed a petition for limitation of liability in the District Court of Ohio. The owners of the bridge objected to the jurisdiction of the court on the ground that the damage to the bridge being non-maritime in nature, the right of action to recover therefor was exclusively within the jurisdiction of a court of law, and

* See, too, the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Re Charles Nelson Co.* (Appendix VII, brief of appellant petitioner).

the District Court could not entertain limitation proceedings. The court, after considering the various statutes governing the limitation of a ship-owners' liability, upheld the right to limit, *notwithstanding the fact that a direct action by the bridge-owner had to be at law with a right of trial by jury.*

In *Butler* v. *Boston Steamship Co.* (*supra*), the claimant was proceeding under a death statute of Massachusetts which provided that one causing death by wrongful conduct should

"be liable in damages not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability".

The interest of the owners in the vessel after the collision did not exceed $1,000. Obviously the Massachusetts statute could not be given full force and effect if the fund from which the claimant could draw was limited to the owner's interest in the vessel. Nevertheless the court held that the Limited Liability Acts applied notwithstanding the liability itself arose from a State law (p. 558).

In re St. Louis & Tennessee River Packet Co., 266 Fed. 919, presented the question of the court's power to enforce the Missouri death statute in limitation proceedings. That statute provides that one responsible for death by wrongful conduct should be liable in the sum of "not less than $2,000 and not exceeding $10,000 in the discretion of the jury". The court granted a petition for limitation of liability and directed that the claims for death be referred to a commissioner for assessment.

The Constitution of the State of New York provides that the amount recoverable for injuries resulting in death "shall not be subject to any statutory limitation" (Art. I, Sec. 18). The Circuit Court of Appeals for the Second Circuit, nevertheless, in *The Transfer No. 12*, 221 Fed. 409, directed that a claim under the New York Death Statute be referred to a commissioner in limitation proceedings for ascertainment of the claimant's pro-rata share in the limitation fund.

The Constitution of the State of Pennsylvania contains a similar provision, but in *Loughin* v. *McCaulley*, 186 Pa. 517, the court held that this provision must yield to the underlying provisions of the Limited Liability Acts.

In *The Hoffmans*, 171 Fed. 455, it was held that the provision in the act of June 29, 1906 (34 Stat. 595) making carriers liable to holders of bills of lading in certain cases for "any loss, damage or injury" to property, did not effect a repeal of the Limited Liability Acts.

If the courts in applying these statutes have been able to harmonize apparent inconsistencies and apparently irreconcilable features, the same result should follow in the application of Section 33. So long as the ship owner does not claim the benefit of the Limited Liability Acts, a seaman, or in a death action, his personal representative, may proceed in accordance with the provisions of that Section and obtain its full benefits, either in an action at law or by suit in admiralty. It is only when a disaster occurs and the ship owner finds that the total amount of the claims to which he may be subjected will exceed the value of his interest in the venture *or* apprehends that he may be

obliged to defend numerous actions in different courts that he will claim the benefit of the Limited Liability Acts. By so doing he in no way seeks to nullify the effect of Section 33; on the contrary, he recognizes the obligation which it creates but asks to have the obligation itself enforced by reference to, and the extent thereof limited by, certain other statutes which are the basis of responsibility in our maritime law. It results, therefore, that there is no conflict between the two statutes; that each can be given full force in its respective sphere, and that there is no repeal.

II.

The answer to question 1 of the certificate is implicit in the answer to question 2. For if there is no repeal, Section 33 takes its place in our maritime law, coordinate with other statutes which may tend to create new rights, but subordinate to the Limited Liability Acts (*Richardson* v. *Harmon, supra*). It has been suggested by two of the judges below, that even if the right to limit may not have been taken away, the right and the method of enforcement have been materially circumscribed, as in this case, by opposing to it an absolute right on the part of a seaman to a jury trial. But if the Limited Liability Acts are not repealed *in toto*, they cannot be repealed in part and a ship-owner's rights under them cannot be cut down by any interpretation of Section 33 which would virtually emasculate those statutes. If there is no repeal, the procedure dictated by the Limited Liability Acts and by the Supreme Court rules promulgated thereunder, must be followed; and it is settled that the jurisdiction of a court of admiralty in limitation proceedings is

exclusive and that the rights of all persons concerned in the subject matter of the proceedings must be finally determined therein.

San Pedro, 223 U. S. 365;
Richardson v. *Harmon*, *supra*;
Butler v. *Boston S. S. Co.*, *supra*;
Providence & New York S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578;
The 84-H, 296 Fed. 427 (certiorari denied, 264 U. S. 596).

In *Richardson* v. *Harmon* (*supra*), the court after determining that the case under consideration was one in respect to which a ship-owner could limit his liability said:

"If thus the owner's liability for a tort permitted or incurred through the master or crew although non-maritime because due to a collision between the ship and a structure upon land, be one in respect to which his liability is limited, and he applies for the benefit of such limitation to the proper District Court of the United States 'all proceedings' by the express terms of Par. 4285 Revised Statutes, 'against the owner shall cease'. The procedure in any such case is prescribed by the 54th and 55th rules in Admiralty, where it is said that the court shall 'on application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims'. *Providence & N. Y. Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *Butler* v. *Steamship Co.*, 130 U. S. 527, 549" (p. 106).

In the *San Pedro* (*supra*) the court said:

"Conceding all that can be said about the expense, delay and inconvenience which will result if the salvage claimants are to be required to present their claim in the

limited Liability case, yet far greater confusion must result if such objections are enough to defeat the manifest object of the fifty-fourth rule. This court in furtherance of the apparent purpose of Congress to limit the liability of vessel owners (Revised Statutes, §§ 4283-5), has, by that rule, prescribed how an owner may avail himself of the benefit of the statute. *The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case*" (p. 371) (italics ours).

In *Providence & New York S. S. Co.* v. *Hill* (*supra*), the court said:

"In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners, for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals" (p. 594).

The court also said:

"We have deemed it proper to examine thus fully the foundation on which the rules adopted in December term, 1871, were based, because, if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution *pari passu* of distinct suits in different courts, or even in the same court by separate claimants against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings, and subversive of their object and purpose" (p. 594).

We submit, therefore, that if Section 33 has not repealed the Limited Liability Acts and if an action

under that section is one in which the ship-owner is entitled to limit his liability, the procedure common to all limitation proceedings must be followed, and the injunction must issue.

The procedure in the limitation of liability is uniform and coherent. In proceedings to limit liability, a single court determines all questions of liability, of the right to limit, and the validity and extent of the claims. To depart from that procedure, and to permit claimants, at their option, to have their claims passed on by juries in advance of a hearing in admiralty in limitation proceedings, or in disregard of such a hearing, would result in extreme uncertainty in the law, and would defeat Congressional policy with respect to the liability of ship-owners and the method of enforcing that liability.

1. The answer to the first question certified should be, Yes.

2. The answer to the second question certified should be, No.

Respectfully submitted,

CHAUNCEY I. CLARK,
SAMUEL C. COLEMAN,
as *amici curiæ*.

Dated, New York, November 10, 1924.

N1917

Table of Contents

	Pages
Statement	i-vii
The questions certified	i- ii
Position of *amici curiae* on the questions	vi
Point One. Section 33 of the Merchant Marine Act of 1920 creates new liabilities which are independent of the Limited Liability Statutes	2 - 29
A. It creates new rights of action which never existed for seamen	2
B. The liabilities corresponding with the new rights of action are independent of the Limited Liability Statutes	2 - 29
1. The Employers Liability Act of April 22, 1908, ch. 149, 35 Stat. L. 65, as amended, and the statutes to which it refers (Statutes Enacted for the Safety of Employees) furnish a complete code of liability of the employers to which it refers for damages for injury to or death of their employees	4 - 8
2. The Railroad Statute shows the policy of Congress to grant to railway employees the right to obtain for their injuries the damages which they have suffered. This policy is now made applicable by Section 33 of the Merchant Marine Act of 1920 to seamen as employees	8 - 23
3. Legislation on the subject of vessel-owner's liability shows that Congress intended there should be no limitation of the liability to seamen under Section 33	23 - 27
4. The policy of giving redress to injured employees or damages to their dependents if they are killed is superior to the policy of protecting the property interest of shipowners	27 - 29

Pages

Point Two.
Section 33 of the Merchant Marine Act of 1920 repeals the Limited Liability Statutes as far as they affect the liability of shipowners for damages for injuries to or the death of seamen.....29 - 32

Point Three.
The decree of the District Court vacating the order staying the action of the appellee for personal injuries and holding that the shipowner-employer's liability therefor is not subject to the operation of the Limited Liability Statutes should be affirmed..... 32

Point Four.
The opinion on appeal in the case of *"The Charles Nelson Company v. Curtis"* does not cover the points advanced in this argument.....33 - 38

Point Five.
Rules of statutory construction exclude the applicability of the Limited Liability Statute to actions under Section 33 of the Merchant Marine Act of 1920.....39 - 62

1. Section 33, by the use of descriptive words of reference, incorporates the Employers' Liability Act..39 - 43
2. The rule of *ejusdem generis* shows that these words of reference describe statutes which are characterized by their creation or enlargement of rights and remedies for injuries or death of railway employees.....43 - 45
3. The rule, *expressio unius est exclusio alterius,* excludes the Limited Liability Statutes from express incorporation..... 45
4. The same rule excludes the Limited Liability Statutes from implied incorporation.....46 - 57
   (a) The Limited Liability Statutes do not apply to actions under the Employers' Liability Act.....46 - 53
   (b) The Limited Liability Statutes do not apply to suits under the act relating to death caused by wrongful act or neglect on the high seas..53 - 57

Pages

5. What is termed the policy of the government with reference to any particular legislation is too unstable a ground upon which to rest the interpretation of statutes, but the purpose of Congress is discoverable through the course of legislation.....58 - 59

6. The primary rules that every part of a statute should be given effect and that its words are to be taken according to their natural meaning show that Section 33 is not subject to but is paramount to the Limited Liability Statutes.....59 - 62

Point Six.

The answers to the certified questions should be those given in the opening statement in this brief..... 62

Table of Authorities Cited

Pages

Constitution of the United States, seventh Amendment... 14

STATUTES.

Act Relating to the Maintenance of Actions for Death on the High Seas and Other Navigable Waters, Act of March 30, 1920 (Ch. 111, 41 Stat. 537).....vi, 24, 25, 53 - 57

Act to Provide Compensation for Employees of the United States Suffering Injuries While in the Performance of Their Duties, etc., Act of Sept. 7, 1916 (Ch. 458, 39 Stat. 742)..... 28

Act to Provide for Better Security of Life on Board of Vessels Propelled in Whole, or in Part, by Steam, etc. (16 Stat. 440)..... 23

Carmack Amendment of June 29, 1906, to Interstate Commerce Act (Ch. 3591, Section 7, 34 Stat. 595)..... 22

Employers' Liability Act of April 22, 1908 (Ch. 149, 35 Stat. 65).....vi, vii, 4, 8, 17, 21, 22, 27, 30, 46-50, 52, 53, 57, 61

Harter Act, Section 6 (27 Stat. 446)..... 23

Hours of Service Act of March 3, 1907 (Ch. 2739, 34 Stat. 1415)..... 28

Interstate Commerce Act, Carmack Amendment of June 29, 1906 (Ch 3591, Section 7, 34 Stat. 595)..... 22

Judicial Code, Sections 24, 256.....10, 14

Judicial Code, Sections 24, 256, Amendment of Oct. 6, 1917 (Ch. 97, 40 Stat. 395)..... 28

Judicial Code, Sections 24, 256, Amendment of June 10, 1922 (Ch. 216, 42 Stat. 634)..... 7

Limited Liability Statutes, R. S. Sections 4283-4289, as Amended by Section 18 of the Act of June 26, 1884 (23 Stat. 58).....ii, iii, 1-3, 8, 9, 23, 40

Merchant Marine Act of 1920, Section 33 (41 Stat. 1007) ii, iii, iv, vi, vii, 1, 2, 8-20, 28, 31, 32, 35, 37, 38, 45, 46, 55, 57, 59-62

Pages

New York Workmen's Compensation Act, Ch. 67 of Consolidated Laws (New York) and Ch. 41 and 316 of Laws of 1914.....47, 50

Revised Statutes of the United States, Section 1908..... 51
Revised Statutes of the United States, Sections 4283-4289 .....ii, iii, 1-3, 8, 9, 23, 40

Seamen's Act of March 4, 1915, Section 20 (Ch. 153, 35 Stat. 1185) 11, 28, 49, 55, 62
Suits in Admiralty Act of March 9, 1920 (Ch. 95, 41 Stat. 525)..... 24

CASES.

Annie Faxon, The, 75 Fed. 312..... 31
Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167..... 23

Benefactor, The, 103 U. S. 239, 26 L. ed. 351..... 38
Berthard v. Shell Oil Co. of California, 1924 A. M. C. 1304..... 34
Butler v. Boston & Savannah Steamship Co. 130 U. S. 527, 32 L. ed. 1017..... 23

Charles Nelson Co., In re, 294 Fed. 926 (The Mary Winkleman, 1924 A. M. C 118) (U. S. D. C. N. D. Cal.) .....v, 19, 31, 33, 58
Charles Nelson Co. v. Curtis (C. C. A., Ninth Circuit) (not yet reported)..... vi. 33
Chelentis v. Luckenbach SS. Co., 247 U. S. 372, 62 L. Ed. 1171.....11, 28, 29
Chesapeake etc. R. Co. v. Kelly, 241 U S. 485, 60 L. ed. 1117..... 18
City of New York v. Hexamer, 69 N. Y. Supp. 198, 59 App. Div. 4..... 51
City of Norwich, The, 118 U. S. 468, 30 L. ed. 134..... 9
Cottrell, Ex parte, 59 Cal. 417..... 41

Edward, The, 294 Fed. 686 (1923 A. M. C. 171) (U. S. D. C E. D. N. Y)..... 19
Edward, The, 291 Fed. 1017 (C. C. A., Second Circuit).. ii
El Mundo, 294 Fed. 577, 1923, A. M. C. 383.....19, 42

Pages

Fullerton, The, 167 Fed. 1..... 29

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158..... 42
Goodridge v. Lord, 10 Mass. 483..... 10

Hadden v. The Collector, 5 Wall. 107, 18 L. ed. 518..... 58
Heath, In re, 144 U. S. 92, 36 L. ed. 358..... 45
Hewitt, The, 294 Fed. 577, 1923 A. M. C. 383..... 42
Hoffmans, The, 171 Fed. 455..... 22

Iroquois, The, 194 U. S. 240, 48 L. ed. 955..... 6

Jacobs v. Southern R. Co., 241 U. S. 229, 60 L. Ed. 970.. 30
Johnson v. Southern Pacific Co., 196 U. S. 1, 49 L. ed. 363 27

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 64 L. ed. 834..... 28

Lothrop, Ex parte, 118 U. S. 113, 30 L. ed. 108..... 51

Mansfield v. People, 45 N. E. 976, 164 Ill. 611..... 51
Marshall v. Boardman, 35 Atl. 1024, 89 Me. 87..... 10
Martin v. U. S. S. B. E. F. Corp. (U. S. D. C. S. D. N. Y.) (not yet reported)..... 44
Mary Winkleman, The, 1924 A. M. C. 118 (In re Charles Nelson Co., 294 Fed. 926).....v, 19, 31
Mason v. United States, 260 U. S. 545, 67 L. ed. 396.....43, 62
McCullough-Fagan Lumber Co. v. Jannsen, 292 Fed. 377, 1923 A. M. C. 1088..... 2
Merchants Transportation Co., In re (U. S. D. C. W. D. Wash.) (not yet reported)..... 20
Metropolitan Redwood Lumber Co. v. Doe, The San Pedro, 223 U. S. 365, 56 L. ed. 473.....38, 60

New York C. R. Co. v. United States, 1923-1924 Adv. Op. (68 L. ed.) 484..... 27
Norwich Co. v. Wright, 13 Wall. 104, 20 L. ed. 585....16, 40

Oceanic Steam Navigation Co. v. Mellor, The Titanic, 233 U. S. 718, 58 L. ed. 1171.....40, 45, 54, 57
Osceola, The, 189 U. S. 158, 47 L. ed. 760.....10, 29

Pages

Panama Railroad Co. v. Johnson, 1923-1924 Adv. Op. (68 L. ed.) 434.....2, 3, 8, 11-16, 37-40, 45, 58, 59, 61
Panama Railroad Co. v. Johnson (C. C. A. Second Circuit), 289 Fed. 964, 973..... 28
Passaic, The (U. S. D. C. E. D. N. Y.), 190 Fed. 644.... 6
Passaic, The (C. C. A., Second Circuit), 204 Fed. 266.21, 46, 53

Rebecca, The, Fed. Cas. No. 11,619..... 16

San Pedro (The), Metropolitan Redwood Lumber Co. v. Doe, 223 U. S. 365, 56 L. ed. 473.....38, 60
Scow 84-H, The, 296 Fed. 427..... 37
Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062..... 30
Sheriffs v. Pugh, 22 Wis. 273, 94 Am. Dec. 600..... 10
Smith v. Cook, 164 Fed. 628..... 29
Southern Pacific Co. v. Jensen, 244 U. S. 204, 61 L. ed. 1086.....28, 49, 50, 52
St. Louis etc. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160.....17, 43
State v. Tucker, 61 Pac. 894, 36 Or. 291..... 41
State of Washington v. W. C. Dawson & Co., 1923-1924 Adv. Op. (68 L. ed.) 339..... 7, 50
Stewart v. Pacific Steam Navigation Co., 1924 A. M. C. 1272 56

Three Sisters, The, 1924 A. M. C. 1290..... 35
Titanic (The), Oceanic Steam Navigation Co. v. Mellor. 233 U. S. 718, 58 L. ed. 1171.....40, 45, 54, 57

Washington Southern Navigation Co. v. Baltimore etc. Co., 1923-1924 Adv. Op. (68 L. ed.) 242.....21, 36
Whitehead v. Cape Henry Syndicate, 54 S. E. 306, 105 Va. 436..... 45
Wiley v. Corporation of Bluffton, 12 N. E. 165, 111 Ind. 152..... 41
Windrush, The, 286 Fed. 251.....26, 54
Winfree v. Northern Pacific R. Co., 227 U. S., 296, 57 L. ed. 516..... 6, 22

Pages

MISCELLANEOUS.

Admiralty Rules, 254 U. S. 703, 65 L. ed. 1184:
Rule 50 20
Rule 51 ..... 11, 20, 36
Rule 52 20

MacArthur, The Seaman's Contract, Appendix, "A Review of the Principal Subjects of Legislation, 1790-1918", pp. 203-224 27

Webster's Universal Dictionary, 1905 51

No. 359

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1923

In the Matter of the Petition of THE EAST RIVER TOWING CO., INC., for Limitation of Its Liability as Owner of the Steamtug "Edward", her engines, etc.

On questions certified by the United States Circuit Court of Appeals for the Second Circuit upon the appeal of

THE EAST RIVER TOWING CO., INC.,

Petitioner and Appellant,

vs.

ELIZABETH MCCAFFREY, as administratrix, etc.,

Appellee.

BRIEF OF FRANK P. DEERING, HALSEY L. RIXFORD, AND ROBERT M. JONES, AMICI CURIAE.

STATEMENT.

The questions certified to the Supreme Court by the United States Circuit Court of Appeals for the Second Circuit are as follows:

"1. If an action at law be brought such as is described in the Merchant Marine Act, 1920, Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?

"2. Has the Merchant Marine Act, 1920, Sec. 33, impliedly repealed the statute regarding limitation of liability of ship owners so far as claims or suits based on personal injuries or death of seamen are concerned?"

The Edward, 291 Fed. 1017.

The portions of the limited liability statutes material here are the Act of March 3, 1851, C. 43, 9 Stat. 635, as now found in Sections 4283-4285 of the Revised Statutes and Section 18 of the Act of June 26, 1884, C. 121, 23 Stat. 57.

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

"Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate

proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

"Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease." *Revised Statutes.*

"Sec. 18. That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners." *Act of June 26, 1884, C. 121, 23 Stat. 57.*

Section 33 of the Merchant Marine Act of June 5, 1920, C. 250, 41 Stat. 1007, amends Section 20 of the Seamen's Act, entitled "An Act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea," C. 153, 38 Stat. 1185, and reads:

"Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The interest of the proctors filing this brief as *amici curiae* arises through the following facts:

In November, 1923, there was at issue and there is now pending, in the Southern Division of the United States District Court for the Northern District of California, an action at law brought under Section 33 of the Merchant Marine Act of 1920, which action is No. 16,769, and is entitled "Thos. S. Curtis, Plaintiff, vs. The Charles Nelson Company, a corporation, Defendant." In that action the plaintiff sought recovery of damages in the sum of $22,000.00 for personal injuries suffered aboard the American barkentine "Mary Winkleman" on or about September 5, 1921, through the negligence of the mate of the vessel, in the course of the employment of the plaintiff as a seaman of that

vessel by the defendant corporation, the owner and operator thereof. Prior to the trial of the action, the defendant commenced in the same court a proceeding in admiralty, No. 17,769, entitled "In the Matter of the Petition of The Charles Nelson Company, a corporation, for Limitation of Liability."

In that proceeding the following proceedings were had.

The "Mary Winkleman" was appraised at the sum of $1500.00 and it was found that there was no freight pending at the termination of the voyage on which Curtis was injured; the petitioner, upon filing an admiralty stipulation in the sum of $1500.00, obtained from the Honorable John S. Partridge, District Judge, in November, 1923, an order restraining the prosecution of the action at law mentioned above and of any and all suits against the petitioner in respect of any claim or claims arising in connection with the voyage on which Curtis was injured, otherwise than in the proceeding for limitation of liability, and ordering the issuance of a monition citing all persons having such claims to make proof of them before a commissioner. Curtis, appearing therein specially for that purpose, moved the District Court for an order vacating the stay, directed by the restraining order and monition, against the prosecution of his action; the motion was argued on behalf of Curtis and of the petitioner before Judge Partridge, and was granted on January 3, 1924, Judge Partridge filing an opinion in support of his decision.

In re The Charles Nelson Co., 294 Fed. ~~939~~ 926 (*The Mary Winkleman*, 1924 A. M. C. 118).

The petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order vacating the stay. The trial of the action at law has not been held. The action at law and the proceedings in the District Court for limitation of liability have been in abeyance since the appeal was taken. On October 27, 1924, the Circuit Court of Appeals for the Ninth Circuit rendered a decision reversing the order of the District Court vacating the stay of the action at law.

The Charles Nelson Company v. Curtis (not yet reported).

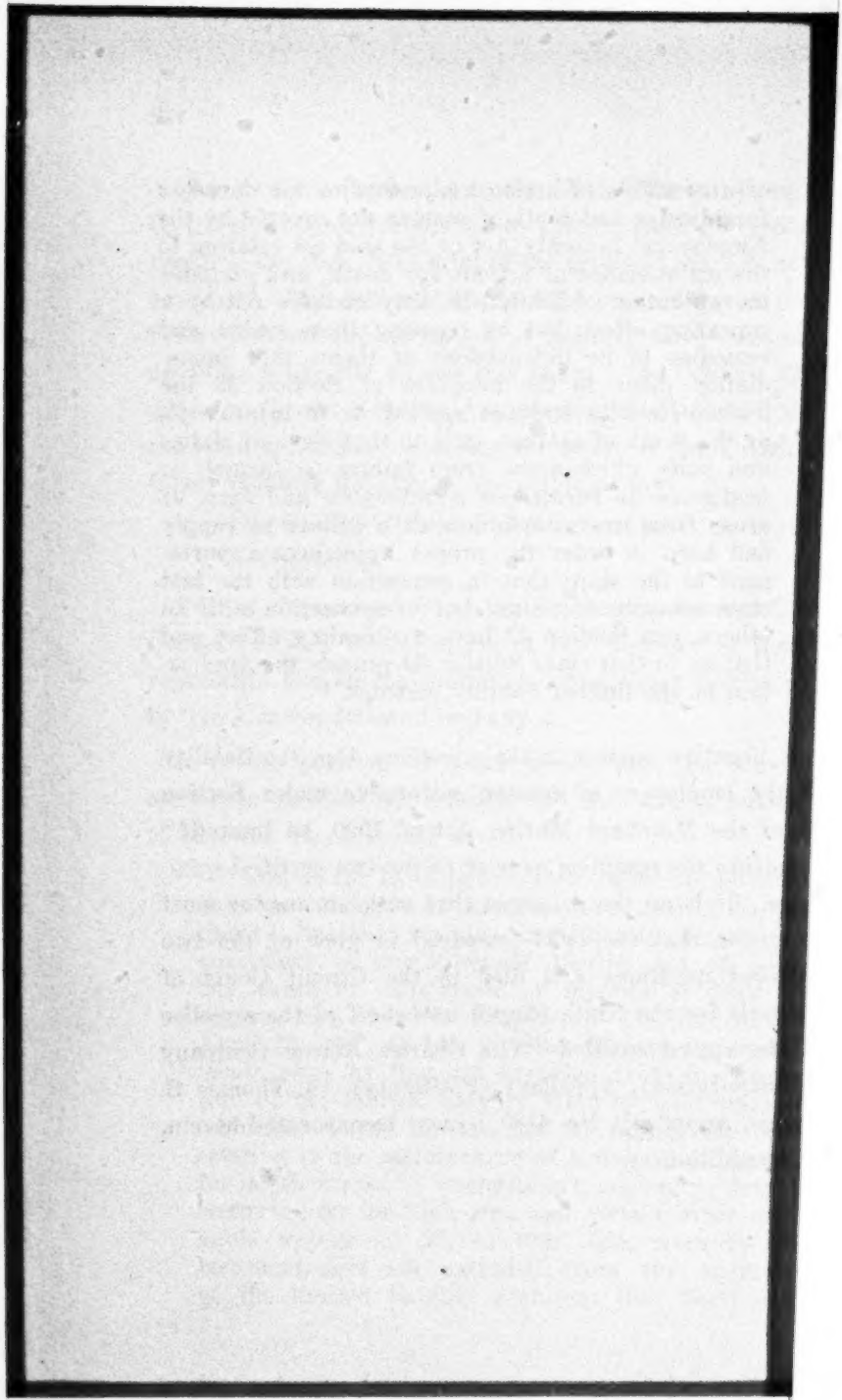
Two of the counsel filing this brief are attorneys for Curtis, plaintiff in the action at law, and one of them represents him in the limitation proceedings instituted by The Charles Nelson Company.

It is the position of *amici curiae* that the court's answer to question No. 1 should be "No" and its answer to question No. 2 should be:

> "Yes, so far as claims or suits based on personal injuries or death of seamen were subject to the limited liability statutes immediately before the enactment of the Merchant Marine Act of 1920; but claims or suits based on injuries or death of seamen subject to the Employers' Liability Act of April 22, 1908, C. 149, 35 Stat. 65, and its amendments were by that act excluded from the operation of the limited liability statutes; and suits in admiralty based on the Act of March 30, 1920, relating to the maintenance of actions for damages for death caused by wrongful act, neglect, or default occurring on the high seas and certain other navigable waters, C. 95, 41 Stat. 525, were by the last-mentioned act excluded from the operation of the limited liability statutes; that Section 33

creates rights of action and remedies for damages for injuries and death of seamen not covered by the Employers' Liability Act or the said act relating to the maintenance of actions for death, and excludes the operation of limited liability statutes not by a repealing effect, but by creating these rights and remedies to be independent of them; that immediately prior to the adoption of Section 33 the limited liability statutes applied, as to injuries to, or the death of seamen, only to that class of claims and suits which arose from failure to furnish or negligence in furnishing maintenance and cure, or arose from unseaworthiness or a failure to supply and keep in order the proper appliances appurtenant to the ship; that in connection with the last class of suits or claims, but in connection with no others, can Section 33 have a repealing effect and that as to that class Section 33 repeals the application of the limited liability statutes."

A negative answer to the question: Can the liability of the employers of seamen, enforcible under Section 33 of the Merchant Marine Act of 1920, be limited?" furnishes the complete answer to the two certified questions. It is on the principle that such an answer must be given, that the brief prepared in view of the two certified questions and filed in the Circuit Court of Appeals for the Ninth Circuit on behalf of the appellee in the appeal entitled "The Charles Nelson Company (a corporation), Appellant (Petitioner), vs. Thomas S. Curtis, Appellee", No. 4180, is next incorporated herein, with additions.



IN THE MATTER OF PETITION OF EAST RIVER TOWING CO., INC., FOR LIMITATION OF LIABILITY OF THE STEAMTUG EDWARD, HER ENGINES, ETC.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 81. Argued November 25, 1924.—Decided December 8, 1924.

1. An action at law brought under § 33 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, to recover damages for the death of a seaman from personal injuries suffered in the course of his employment, is subject to the injunction provided by Admiralty Rule 51 in aid of limitation of liability proceedings. P. 366
2. The Merchant Marine Act, § 33, did not impliedly repeal the statute regarding limitation of liability of shipowners (Rev. Stats., §§ 4283, *et seq.*,) so far as claims or suits based on personal injuries to, or death of, seamen are concerned. *Id.*

CERTIFICATE from the Circuit Court of Appeals in a proceeding in admiralty for limitation of liability, appealed from the District Court. See 291 Fed. 1017.

Mr. E. C. Sherwood and *Mr. John M. Woolsey*, with whom *Mr. Clarence S. Zipp* was on the brief, for appellant.

The purpose of the law of limitation of liability is to encourage the building of and investment in ships. As a consequence, it is to be liberally construed and fully enforced. *The Main* v. *Williams*, 152 U. S. 122; *Richardson* v. *Harmon*, 222 U. S. 96; *Norwich Co.* v. *Wright*, 13 Wall. 104; *The Scotland*, 105 U. S. 24; *Providence S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *La Bourgogne*, 210 U. S. 95; *Moore* v. *American Transp. Co.*, 24 How. 1.

That the Limited Liability Law is applicable to cases of personal injury and death is well established. *Butler* v. *Boston S. S. Co.*, 130 U. S. 527; *Craig* v. *Continental Ins. Co.*, 141 U. S. 638; *White* v. *Island Transp. Co.*, 233 U. S. 346; *Richardson* v. *Harmon*, *supra*.

The proceeding must necessarily be exclusive in order to give the shipowner the remedy and relief intended by Congress. Admiralty Rules, 51–55; *The San Pedro*, 223 U. S. 365; *Providence S. S. Co.* v. *Hill Mfg. Co.*, *supra*; *Norwich Co.* v. *Wright*, *supra*.

The theory is that, as there was one wrong committed by the shipowner, he is entitled to a remedy somewhat analogous to the old Bill of Peace in equity, to enable him to try out his liability as against everyone interested, in the one proceeding. See *La Bourgogne*, *supra*; *The Titanic*, 233 U. S. 718; *The Lusitania*, 251 Fed. 715.

In *The F. H. Marvin*, 1924, Am. Mar. Cas. 53, a motion to vacate a stay of state court proceedings, on the ground

that § 33 of the Merchant Marine Act overrode a shipowner's remedy in limitation of liability, was properly denied.

The outstanding feature of § 33, which materially changes or purports to change the rights of a seaman, is the provision abolishing the fellow-servant rule as a defense. This had been ineffectually attempted in § 20 of the Seaman's Act. *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 372. That principle and the principle of limited liability do not conflict. Both continue in force at the same time. One forms a part of the rules by which is determined the presence or absence of legal liability on the part of the employer; the other relates to the aggregate amount that an employer who has been found legally liable shall be made to pay.

The Federal Employers' Liability Act (adopted in the Merchant Marine Act,) does not by implication repeal the statutory provisions permitting shipowners to limit their liability, or affect the right of the owner to maintain proceedings for such limitation in a court of admiralty. *The Passaic*, 204 Fed. 266.

By reason of their very nature, many provisions of the "statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees" do not apply to actions by seamen, and cannot be made to apply, the fiat of Congress to the contrary notwithstanding. A seaman is not concerned with defects in railroad tracks, cars, locomotives or roadbeds; or with safety appliances on locomotives and railroad cars. In these circumstances, it is not too much to say that Congress understood that the sweeping language employed must of necessity be limited by many exceptions not therein expressed or suggested. The result is plainly to cast upon the courts the burden of determining what changes in the maritime law were intended and effected.

Section 33 created new rules of liability as between seamen and shipowners; the substantive nature of their relationship was modified. At the same time, moreover, these rules of liability were enforceable, either at common law with a jury "as an incident", or in admiralty before the court. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375.

The statute thus construed merely places seamen in a remedial status the same as that in which they have always been. They could always bring a common law action to enforce their substantive rights. The jury was not a part of the right conferred, but merely a part of the machinery of the remedy.

But a petition for limitation of liability is also a remedy which is available to the shipowner. It does not affect the rights of the seamen under § 33, but only the form of the seamen's remedy.

There has never been a right of trial by jury in admiralty. Rev. Stats., § 648, excludes juries from proceedings under equity and admiralty jurisdiction, and this Court has uniformly sustained this procedure.

Inasmuch as this Court has construed § 33 to have become part of the maritime law, all question of any alleged right to a jury trial is excluded. Indeed, it is difficult to understand on what the alleged right to a jury trial, in this case, could be based, except on a constitutional provision. So far as the admiralty court is concerned, there is no such provision. Consequently, when a shipowner invokes an admiralty remedy in the admiralty court, the fact that a jury might be available in another forum seems immaterial.

There was not any repeal of the limitation statutes by implication. The Merchant Marine Act, § 2, repeals certain enumerated acts, but no mention is made of the limited liability laws. The rule that the enumeration of certain members of a class is the exclusion of all others

of that class not enumerated, applies. *Soliss* v. *General Elec. Co.*, 213 Fed. 204. When Congress determined to exempt seamen's wages from the operation of the limited liability statute, it did so in specific terms. 23 Stat. 57.

Repeals by implication are not favored. To find a repeal by implication, that implication must be the necessary deduction from the later statute. If the two statutes can be construed so as to be reconcilable, that construction should be taken rather than one which effects repeal of the earlier law. The two statutes here under consideration are not so hostile that both cannot stand. The contention that acts giving new rights against or imposing new liabilities on shipowners have repealed in part, at least, the limitation of liability statutes, is not novel; where this contention has been made the courts have disapproved it. *Chappell* v. *Bradshaw*, 35 Fed. 923; *The Hoffmans*, 171 Fed. 455; *The Passaic*, 204 Fed. 266; *Alaska S. S. Co.* v. *United States*, 259 Fed. 713; s. c. 253 U. S. 113; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527.

The application of the limited liability statutes is not confined to cases involving claims of seamen. It applies to cases involving claims of passengers, owners of other ships, shippers, salvage claimants, stevedores, the Government, and bridge owners. [Citing cases.] These various parties must come into a limitation proceeding to assert their claims, although quite obviously they would have no concern with any of the provisions of the Merchant Marine Act. Also, the great majority of injured seamen would never be in collision with the limited liability statutes.

Thus there is no identity between the field of operation of the one statute and that of the other which could serve as a basis for a conclusion that the later act was intended to repeal the eariler.

Passengers and other classes have a right to a jury trial and full indemnity, subject to a shipowner's right to

limit his liability. When a seaman is given a right to a jury trial and full indemnity, it is presumably for the purpose of granting him rights equal to those of the other classes. The statute is without words of preference which would indicate an intent to grant him greater rights. The provision as to jury trial was put in to make it clear that the new maritime law was to be enforced on the common-law side of the court, and that the usual defenses should not apply in seamen's cases in common-law courts.

The appellee contends that § 6 of the Federal Employers' Liability Act, forbidding removal from a state to a federal court, is incorporated by reference into the Merchant Marine Act, and that appellant's proceeding to limit its liability is a removal. The answer is obvious. Appellant's proceeding is not a removal of the appellee's state court action; it is an entirely new proceeding in a new forum in arrest of that state court action. *Providence S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578.

It is then unnecessary to consider appellee's argument that § 6 is incorporated in the Merchant Marine Act; although it may be noted that an action at law in a state court, brought by a seaman under that act, has been held removable into a federal court. *Wenzler* v. *Robin Line S. S. Co.*, 277 Fed. 812.

The limitation of liability acts deal with remedies, not with substantive rights. *Butler* v. *Boston S. S. Co.*, 130 U. S. 527; *The Titanic*, 233 U. S. 718.

Mr. William S. Butler and *Mr. James A. Gray*, with whom *Mr. Henry J. Beilman* was on the brief, for appellee.

The limited liability statutes have no application to cases brought under the Merchant Marine Act for personal injury resulting in death. Their history and judicial construction show their purpose to have been not only to encourage the building of a merchant marine, but also to safeguard the rights of seamen, such as the exemption of seamen's wages and the exclusion, from

the benefits of limitation, of loss incurred with the privity and knowledge of the owner.

The limitations and qualifications particularly applicable to this proceeding are such as leave the owner only liable for his own fault, neglect and contracts. *Richardson* v. *Harmon*, 222 U. S. 96; *Pendleton* v. *Benner Line*, 246 U. S. 353; *Liverpool Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

Prior to the Merchant Marine Act, except for unseaworthiness, a seaman injured in course of his employment could recover only maintenance, wages and cure; if death ensued, no right of action existed under the admiralty law. That act placed seamen upon the same footing with railroad employees engaged in interstate commerce, both as to personal injuries and death as the result of such injuries. Now a seaman who suffers personal injury may, at his election, maintain an action for damages at law with the right of trial by jury, and all statutes modifying or extending the common-law right or remedy of railway employees shall apply; and, in case of his death from such injury, his personal representative may maintain an action at law with the right of trial by jury, and in such case all statutes of the United States conferring or regulating the right of action for death in case of railway employees shall apply.

The petition of appellant to limit its liability constituted a removal of the action from a state court to a federal court. *The San Pedro*, 223 U. S. 365. The state court is ousted of all jurisdiction, and the remedy sought therein must be pursued in the proceeding in the admiralty court. Appellee's right to damages and the amount thereof, if any, must be determined by a commissioner named by the admiralty court instead of, as Congress says, "an action for damages at law with the right of trial by jury." The court is without power thus to abrogate a valid provision of statute law. Sec-

tion 6 of the Employers' Liability Act prevents the removal from a state court to a federal court on any ground whatever. *Martin* v. *New York R. R. Co.*, 241 Fed. 696; *Teel* v. *Chesapeake Ry. Co.*, 204 Fed. 918; *Hulac* v. *Chicago Ry. Co.*, 194 Fed. 747. It is hardly conceivable that Congress, when it passed the Merchant Marine Act, was ignorant of § 6 of the Employers' Liability Act, or of the construction that had been put upon it by the courts. As it did not except from the statute the application of this section to cases of seamen, the conclusion is that it was intended to apply.

It is said that the repealing clause of the act says nothing of limited liability, while, if Congress intended to affect that provision, it would have referred to it specifically. Why, when the system brought into the admiralty law contains a prohibition of limited liability (Employers' Liability Act, § 5) should further reference be necessary? Section 5 declares an established policy,—that full indemnity shall be paid for the injury sustained by all who come within its provisions,—and it prohibits any device to exempt the employer from liability. See *Liverpool Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

Certainly Congress never intended to permit a limitation of liability which it prohibited the parties themselves to create by agreement. To do so would be to practically nullify the removal of a distinction between employees differing only in the place of employment and to render nugatory a remedial act which must always be given such construction as will best tend to prevent the mischief and advance the remedy.

The power of Congress to enact § 33 of the Merchant Marine Act is sustained in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375. Congress, exercising the power it has always possessed but has never before used, brought into and made part of the maritime law that system of rules which, since 1908, has been applicable to railroad employees. This is no greater innovation in the existing

order than was the original incorporation of the rules in the system from which they are taken.

Repeals by implication are not favored; but, in so far as a subsequent statute is inconsistent with an existing one, or the new statute covers the entire field to which it relates or changes a legislative policy theretofore established, or qualifies existing law, the subsequent statute will prevail. *The Paquete Habana*, 175 U. S. 677; *United States* v. *Yuginovich*, 246 U. S. 448; *Campbell* v. *Wadsworth*, 248 U. S. 169. An analogous situation arose in connection with the construction of the Act of 1884, adding to the existing limited liability statute. See *Richardson* v. *Harmon*, 222 U. S. 96, 103.

For the benefit of seamen, and in a manner approved by this Court, the rules applicable to railroad employees were made a part of the maritime system. *Panama R. R.* v. *Johnson*, *supra*. If the restriction contended for by the appellant attaches, the system is in effect nullified and the great step forward rendered worthless to those intended to be benefited thereby. See Benedict, Admiralty, 4th ed., p. 149, § 190; *In re Charles Nelson Co.*, 294 Fed. 926.

The Benefactor, 103 U. S. 239, is not an authority either to stay the prosecution of the action now pending or for the proposition that the limited liability act is applicable under the circumstances of the instant case. The theory of that decision is that the flexibility of admiralty proceedings is such as to enable courts so to shape their course as to obtain justice between the parties, and extends the right to limit the liability after the damages have been assessed by the trial court.

The classes of persons other than seamen who must come into a limitation proceeding to assert their claims of course have no concern with the Merchant Marine Act, and hence are in no way affected by it but remain just where the limited liability statutes place them.

On the other hand, the representative of the seaman whose death resulted from personal injuries is vastly concerned. His cause of action was unknown to the maritime law until almost three quarters of a century after the Limited Liability Act was passed. The section of the Merchant Marine Act which created this cause of action attached no limitation or qualification to it, but made it specifically applicable to seamen only, and to them only when death ensued from injury sustained in the course of employment.

Under the limited liability statutes, the shipowner, while liable without limit for his own negligence, is liable only to the extent of the ship and freight for the negligence or misconduct of the master and crew. Under the system imported into the maritime law and which appellee invokes, he is liable, without limit, not only for his own negligence, but for the negligence of those to whom he delegates the duties imposed by law upon himself, that is to say, for death resulting in whole or in part from the negligence of any of the officers, agents or employees of the shipowner or by reason of any defect or insufficiency due to his negligence in the ship's appliances or machinery.

In case of death, "election" is not a part of the provision. The right to "maintain" the action is not subjected to any limitation or qualification whatever.

Mr. Chauncey I. Clark and *Mr. Samuel C. Coleman*, by leave of Court, filed a brief as *amici curiae*.

Mr. Frank P. Deering, *Mr. Halsey L. Rixford* and *Mr. Robert M. Jones*, by leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here upon a certificate from the Circuit Court of Appeals for the Second Circuit. The facts

are few. On August 2, 1922, the Steamtug Edward, belonging to East River Towing Company, Inc., a New York Corporation, sank in New York harbor because of an explosion of her boiler. This caused the death of her captain, Thomas McCaffrey, and his administratrix brought a suit against the Company in the Supreme Court of New York. Thereupon the Company filed a petition for limitation of liability in the District Court of the United States. Rev. Stats., §§ 4283, *et seq.* Admiralty Rules 51–55. The District Court made an order under Rule 51 restraining the further prosecution of the suit, but on motion vacated the stay on the ground that the statutes limiting liability were repealed so far as they applied to this case by the Merchant Marine Act, June 5, 1920, c. 250, § 33; 41 Stat. 988, 1007; under which the suit purports to be brought. 294 Fed. 686. The questions certified are: "(1) If an action at law be brought such as is described in Merchant Marine Act 1920, Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51? (2) Has the Merchant Marine Act 1920, Sec. 33, impliedly repealed the statute regarding limitation of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned?"

Section 33 of the Merchant Marine Act gives an action at law with the right of trial by jury to any seaman suffering personal injury in the course of his employment, or to his personal representative in case of his death from such injury. In the former cases the statutes of the United States modifying or extending the common law right or remedy of railway employees shall apply; in the latter such statutes conferring or regulating the right of action for death of such employees. The argument that this section removes the personal injury or death of seamen from the statutes limiting liability is based upon the growing considerations for the claims of labor; the

suggestion that the enlistment of seamen needs to be encouraged equally with the building of ships; and the supposed inconsistency of the right to a jury trial and of some of the statutes incorporated by reference, with the continued application of the older law. Thus the Act of April 22, 1908, c. 149; 35 Stat. 65; as amended by the Act of April 5, 1910, c. 143; 36 Stat. 291; regulating actions for injuries or death of railroad employees gives concurrent jurisdiction to the courts of the States and of the United States and forbids the removal of cases arising under the act from state courts of competent jurisdiction to any court of the United States. It is argued that a stay of proceedings in the State Court and an adjudication in the District Court would be a removal; which of course it would not be in a technical sense. It is said with more force in *The El Mundo*, 294 Fed. 577, 579, that when § 33 was passed a seaman at his election already had his action with trial by jury, or a libel in the admiralty, but in either case subject to injunction and a concourse under Rev. Stats., § 4285, and that if the new section left the seaman's election liable to be defeated by the election of the owner to surrender his ship, it was empty words. So the "election" to "maintain" an action at law given by § 33 is thought not reconcilable with the possibility that he should be called into admiralty against his will, and his action at law stopped. *In re Charles Nelson Co.*, 294 Fed. 926, 929; (reversed however, October 27, 1924; 1 F. (2d) 774).

We are of opinion that these arguments cannot prevail. We shall not follow the discussions in the briefs as to the origin of the Admiralty rule, a question that cannot be answered with confidence from the historical material now at hand. The English Courts interpreting, we presume, the scope of their own decisions, rather than passing upon historical fact, refer the Admiralty liens to the commercial convenience of security and repudiate the

reference of liability to the guilt of the ship. *The Tervaete*, [1922] P. 259, 270. In this Court the ship has been personified so far as to incur liability in cases where the owner could not be held. *The China*, 7 Wall. 53. See *The Malek Adhel*, 2 How. 210, 234; *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, 53. It is laid down in *The China* that "originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors." If this be true it gives to our statute a distinguished family tree but hardly throws light upon the question now before the Court.

The short point is that the later act determines the extent of the seaman's substantive rights and the measure of damages, *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391; the earlier one, from what he shall collect those damages in certain exceptional cases, where those rights have been infringed. If there is no surrender of the ship, which we presume is made relatively rarely, the limited liability statutes play no part. Section 33 has no relation to means of collection but only to principles of liability and the ordinary course of trial. Naturally therefore the limited liability laws are not mentioned in the list of statutes repealed, in § 2; yet there can be no doubt that those laws would apply unless repealed. No sufficient reason is offered for the extraordinary preference over other claims that would be given to seamen were the decree of the District Court sustained. When a preference in respect of seamen's wages was intended it was expressed. Act of June 26, 1884, c. 121, § 18; 23 Stat. 57. On the other hand it has been laid down with reference to this same § 33 that an intention to depart from a policy deliberately settled in a general statute is not lightly to be assumed. *Panama R. R. Co.* v. *Johnson*,

264 U. S. 375, 384. See also *Butler* v. *Boston & Savannah S. S. Co.*, 130 U. S. 527. The Bankruptcy Act might provide a bar to recovery—homestead and other exemptions might make collection of a judgment impossible—yet we do not suppose that it would be argued that such laws were overridden by § 33. The wholesale adoption of the law for railroads above mentioned must be taken as an adoption of principles not as a basis for meticulous discovery of conflict with an established system in matters of detail. The choice of a jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up.

We answer these questions as they are asked and assume that the State Court had jurisdiction to try the case under the concluding words of the section: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." For assuming that it had jurisdiction we have no doubt that the injunction may issue and that the statute regarding limitation of liability of ship owners has not been repealed so far as claims like the present are concerned. We answer

Question (1): Yes.
Question (2): No.